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1 STATE OF MINNESOTA DISTRICT COURT
2 COUNTY OF RAMSEY SECOND JUDICIAL DISTRICT
3 - - - - -
4 The State of Minnesota,
5 by Hubert H. Humphrey, III,
6 its attorney general,
7 and
8 Blue Cross and Blue Shield
9 of Minnesota,
10 Plaintiffs,
11 vs. File No. C1-94-8565
12 Philip Morris, Incorporated, R.J.
13 Reynolds Tobacco Company, Brown &
14 Williamson Tobacco Corporation,
15 B.A.T. Industries P.L.C., Lorillard
16 Tobacco Company, The American
17 Tobacco Company, Liggett Group, Inc.,
18 The Council for Tobacco Research-U.S.A.,
19 Inc., and The Tobacco Institute, Inc.,
20 Defendants.
21 - - - - -
22
23 DEPOSITION OF RONALD J. FABER, Ph.D.
24 THURSDAY, SEPTEMBER 11, 1997
25 VOLUME I
STIREWALT & ASSOCIATES
P.O. BOX 18188, MINNEAPOLIS, MN 55418 1-800-553-1953

1 (The following is the deposition of RONALD
2 J. FABER, Ph.D., taken pursuant to notice, at the
3 offices of Dorsey & Whitney, Pillsbury Center South,
4 220 South Sixth Street, Minneapolis, Minnesota,
5 commencing at approximately 8:45 o'clock
6 a.m., September 11, 1997.

7

8 APPEARANCES:

9 On Behalf of the Plaintiffs:

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16

On Behalf of Philip Morris Corporation:

17 JULIA J. TYLER
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On Behalf of Philip Morris Corporation and as
20 Liaison Counsel for Lorillard:

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24

25

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I N D E X

Ronald Faber, Ph.D.

Adverse Examination by Mr. O'Fallon 4 - 287

P L A N T I F F S '

D E P O S I T I O N E X H I B I T S

3313 - Faber expert report	4
3314 - 9/4/97 letter	75
3315 - 9/8/97 letter	75
3316 - Advertising Censorship report	75
3317 - 9/10/97 JAMA article	75

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1 (Plaintiffs' Deposition Exhibit No. 3313 - Faber
2 report - marked for identification.)
8:46:00 3
4 RONALD J. FABER, Ph.D.
5 called herein as a witness, being duly sworn
6 testified as follows:
7 ADVERSE EXAMINATION
8 BY MR. O'FALLON:
9 Q. Could you please state your name for the record
10 please?
11 A. Ronald J. Faber.
12 Q. What is your current address?
13 A. [DELETED].
14 Q. What's your current title?
8:48:00 15 A. Professor.
16 Q. And that's a professor at the University of
17 Minnesota; is that right?
18 A. That's correct. I'm also co-director of the
19 Communication Research Division.
20 Q. That's at the University of Minnesota as well?
21 A. Correct.
22 Q. What do you do at the Communication Research
23 Division?
24 A. It's basically a service arm of the school that
25 helps to conduct research.
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1 Q. Is it set up separately from the school?
2 A. No.
3 Q. How is it funded?
4 A. Actually I don't know.
5 Q. Does it receive any grants?
6 A. Not directly, no.
7 Q. How about indirectly?
8 A. Individuals would get the grants, not the
9 research division.
10 Q. How many individuals are in the research
11 division?
12 A. There is two co-directors. Other than that it's
13 whoever takes advantage of the service.
14 Q. So it's staffed on a permanent basis by two
15 co-directors?
16 A. Correct.
17 Q. You and who else?
18 A. Ken Doyle.
19 Q. Do you receive extra compensation for that duty?
20 A. No.
21 Q. Do you receive grants to do research?
22 A. Occasionally.
23 Q. Through the institute?
24 A. Through the research division?
25 Q. Yes.

8:49:00

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1 A. I haven't.
2 Q. Do you service an administrative function in the
3 research division?
4 A. Could you explain what you mean by that?
5 Q. Do you oversee research; is that your purpose as
6 a co-director?
7 A. Part of it.
8 Q. What are your other duties?
9 A. I guess to oversee the research assistant that
10 operates there, to keep equipment -- to make sure to
11 order equipment that is needed.
12 Q. Anything else?
13 A. Nothing else really comes to mind.
14 Q. Is there any research that's currently being
15 done by the Communication Research Division?
16 A. No.
17 Q. So what exactly is its function? I guess I'm
18 unclear.
19 A. To help people who are doing research. It
20 doesn't do any good itself.
21 Q. What type of help do you provide?
22 A. Consulting, statistical advice.
23 Q. And that's available to who? The Communication
24 Research Division, who is that available to?
25 A. Stephenson Faculty.

8:50:00

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1 Q. In any department?
2 A. Primarily the Department of Journalism and Mass
3 Communications.
4 Q. I've had marked as Plaintiffs' Deposition
8:51:00 5 Exhibit 3313 a report that I believe is your expert
6 report.
7 Could you please identify that document for the
8 record?
9 MR. PURVIS: Dan, while Professor
10 Faber is reviewing that exhibit, I wanted to hand to
11 you as I indicated off the record another document
12 Professor Faber intended to rely on.
13 It was published yesterday entitled
14 Protecting Adolescents From Harm, put out by JAMA.
15 The professor advised me it will also be a document
16 he intended to rely on.
17 BY MR. O'FALLON:
18 Q. I believe I also received in the mail on
19 September 2nd of 1997 a list of documents that were
20 provided by Ms. Tyler. Are you familiar with that
21 list, Doctor?
22 A. I'm sorry?
23 Q. A list of additional references that you intend
8:52:00 24 to rely on?
25 A. Could I see them? What was your question?
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1 Q. This is an additional list of references that
2 you intend to rely on; is that correct?

3 A. Yes.

4 Q. Do you mind if we just -- I've also received
5 another letter dated September 8th. Have you seen
6 that letter?

7 A. Mm-hmm, yes.

8 Q. So in addition to the documents that are listed
9 in your expert report which has been marked as
10 Plaintiffs' Exhibit 3313, you are relying on articles
11 that are contained in a letter dated September 2nd,
12 1997 from Julia J. Tyler to Roberta Walburn as well
13 as articles identified in a September 8, 1997 letter
14 from Julia J. Tyler to Roberta Walburn, correct?

8:53:00

15 A. That appears to be correct.

16 Q. Are there any other documents that you're
17 relying on other than those?

18 MR. PURVIS: Including the JAMA
19 article I just referred to?

20 MR. O'FALLON: Right.

21 THE WITNESS: There may be one piece
22 that's in progress.

23 BY MR. O'FALLON:

24 Q. What piece is that, sir?

25 A. It's an article on third person effect.

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1 Q. Is that an article that you yourself are
2 writing?
3 A. Co-authoring, yes.
4 Q. When do you expect that to be published?
5 A. That's hard to say.
6 Q. In what form is that article in now?
7 A. Draft.
8 Q. Do you plan to submit that for publication in
8:54:00 9 the near future?
10 A. Yes.
11 Q. When?
12 A. I hope that we would do it in September, but --
13 or early October at the latest.
14 Q. When you finalize a draft would you be willing
15 to submit to me the copy of the draft that you're
16 going to submit for publication?
17 MR. PURVIS: Dan, we have got a copy
18 here. I'm handing it to you now.
19 BY MR. O'FALLON:
20 Q. Is this draft that I've now been handed which is
21 an article entitled Advertising Censorship: Factors
22 Accounting for a Willingness to Restrict Advertising
23 for Legal Products?
24 A. Yes.
25 Q. Is this close to a final draft?
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1 A. It's on its way to being final hopefully. It's
2 close.
3 Q. It appears to be an advocacy piece on behalf of
4 advertising; is that correct?
5 A. No.
6 Q. Do you come out in the study opposing the bans
8:56:00 7 of any advertising?
8 A. I don't come out opposing it, no.
9 Q. You don't take a stand on it one way or the
10 other?
11 A. May I take a look? I don't recall in the
12 discussion if we mentioned that.
13 Q. You've had a chance to look at your article
14 entitled Advertising Censorship and you have my last
15 question?
16 A. Could you repeat it?
17 MR. O'FALLON: Read it.
18 (Record read.)
8:57:00 19 THE WITNESS: That's correct.
20 MR. O'FALLON: Why don't we have these
21 four pieces of information marked for the record.
22 THE WITNESS: To be sure I'm answering
23 correctly, could you tell me the question before
24 that?
25 BY MR. O'FALLON:
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1 Q. Let me repeat it. In your article do you oppose
2 banning advertising for any product?
3 A. The article doesn't address the issue of whether
4 it should or should not be banned.
5 Q. What's your own personal opinion about whether
6 advertising for certain products should or shouldn't
7 be banned?
8 A. My personal opinion that's independent of
9 research?
10 Q. Well, sir, you're an expert so independent of
11 research or not, I assume you have an opinion.
12 A. Well, I have a personal opinion, yes.
13 Q. What is that opinion?
14 A. By in large if a product is legal, I don't see a
15 reason to ban advertising. That's a personal
16 opinion.
17 Q. How about restricting advertising? Do you
18 believe advertising should be restricted even if a
19 product is legal?
20 A. Can you define restricted?
21 Q. Limited.
22 A. To --
23 Q. In any fashion.
24 A. It would depend on whether there is evidence to
25 indicate advertising has a particular type of effect.

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1 Q. What if the -- let's take cigarettes for
2 instance. Is it your position that unless cigarettes
3 are banned advertising cigarettes should not be
4 banned?

5 MR. PURVIS: Object to the form.

6 BY MR. O'FALLON:

7 Q. Is it your position that unless cigarettes
8 themselves are banned that advertisement concerning
9 cigarettes should not be banned?

10 A. It's my position that while cigarettes remain a
11 legal product, that advertising, unless it could be
12 shown that it directly causes people to smoke, should
13 not be banned.

14 Q. As you sit here today do you believe that
15 cigarette advertising of any form should be banned?

16 A. I'm not sure I understand the question.

17 Q. As you sit here today do you believe any
18 cigarette advertising or promotion should be banned?

19 MR. PURVIS: Object to the form.

20 THE WITNESS: Could we talk
21 specifics? It's hard to know what you're referring
22 to.

23 BY MR. O'FALLON:

24 Q. You understand what cigarette advertising is,
25 correct?

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1 A. Yes.
2 Q. You understand what cigarette promotion is,
3 correct?
4 A. Let me point out that advertising has broad
5 meanings and narrower meanings, and that it's not
6 always agreed upon what it means.
7 Q. You understand that the cigarette manufacturers
8 have a broad mix of advertising and marketing,
9 correct?
10 A. Correct.
11 Q. And you're familiar with their mix, correct?
12 A. Somewhat.
13 Q. I would assume that you're familiar with their
14 various forms of advertising, correct?
15 A. Some.
16 Q. How much of it are you familiar with?
17 A. I'm familiar with what is available out there.
18 Q. When you say --
19 A. Okay.
20 Q. When you say "what is available out there," what
21 are you talking about?
22 A. I'm talking about broadly the kinds of
23 advertising that are available to consumers.
24 Q. Well, I'm speaking specifically about
25 cigarettes. Is that what you're speaking about too?

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1 A. Correct.
2 Q. So why don't you just list all the advertising
3 and other promotions that the cigarette manufacturers
4 do that you're aware of as you sit here today.
5 A. There is many of them. Cigarette advertisers
6 use billboards, they use magazine ads. Do you
9:01:00 7 want --
8 Q. Everything that you can think of.
9 A. Including promotions?
10 Q. Including promotions.
11 A. Off the top of my head I would say there is some
12 point of purchase displays. I assume couponing.
13 That's what immediately comes to mind.
14 Q. Anything else that you can think of?
15 A. As I sit here right now that's what comes to
16 mind.
17 Q. How about sports sponsorships?
18 A. I'm not quite sure what the exact status of that
19 is now.
20 Q. Have you ever heard of Winston Cup Racing?
21 A. Yes.
22 Q. You understand that's a sports sponsorship,
9:02:00 23 correct?
24 A. Correct.
25 Q. Just so you're clear, our lawsuit starts in '54
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1 and runs up through '94. Are you aware of that?

2 A. Yes.

3 Q. So you have some familiarity with the various
4 kinds of activity and other promotional activities
5 that have been done in that period of time; is that
6 correct?

7 A. Correct.

8 Q. And certainly sports sponsorships are still very
9 much a part of what the cigarette manufacturers do,
10 correct?

11 A. I don't know to what degree.

12 Q. You've heard of the Winston Cup?

13 A. Yes.

14 Q. Have you heard of the Camel Racing Series?

15 A. It doesn't ring a bell.

16 Q. Virginia Slims Tournament?

17 A. Correct.

18 Q. Do you know whether or not there are cigarette
19 advertising or have been in the Metrodome?

20 A. I don't know.

21 Q. You're aware of the fact that cigarette logos
22 appear on numerous merchandise, correct?

23 A. Yes, on some merchandise, yes.

9:03:00 24 Q. So that would be another form of advertisement,
25 correct?

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1 A. Correct.
2 Q. Are you aware of direct mail solicitations?
3 A. Yes.
4 Q. How are you aware of those?
5 A. Just vaguely. I've heard of it in terms of --
6 you're talking now again in terms of cigarette use?
7 Q. Cigarettes, right. Are you aware that the
8 manufacturers on occasion have sponsored various
9 concerts and tours?
10 A. Yes.
11 Q. That would be another form of advertisement or
12 promotion, correct?
13 A. It would be a form of promotion.
14 Q. Of course you see many kinds of point of
15 purchase advertising such as posters, billboards,
16 that kind of thing, in convenience stores, gas
17 stations?
18 A. Billboards are usually considered separately,
19 yes.
20 Q. Placards, you've seen those?
21 A. Mm-hmm.
22 Q. You really can't avoid those; they're in
23 virtually every convenience store you go into, aren't
24 they?
25 A. I don't know virtually every one. I couldn't
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9:04:00

1 answer that, but certainly some.

2 Q. How about most?

3 A. I don't really know.

4 Q. Given the list that you and I have now
5 developed - we have got billboards, magazine ads,
6 point of purchase displays, coupons, sports
7 sponsorships, merchandising, direct mail, promotion
8 of various concert or tours, other point of purchase
9 advertising such as placards and billboards and
10 whatever in convenience stores and around convenience
11 stores - do you favor the banning of any of those
12 forms of promotion or advertising?

13 A. Again, are you asking for a personal opinion
14 here?

15 Q. I'm asking for your expert opinion here. You're
16 an advertising expert.

17 A. Based on an expert, I would say that there is no
18 evidence that would indicate that any of those -- no
19 credible evidence that would indicate that any of
20 those contribute to people initiating smoking.

21 Q. That's not my question. Are you in favor of
22 banning any of those?

23 A. Given that -- you're asking again for a personal
24 opinion, and that requires a value judgment. That's
25 not part of what I consider my role as a scientist or

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1 as a researcher.
2 Q. What's your personal opinion, sir?
3 A. My personal opinion is that given there is no
4 research that credibly supports the fact that these
5 lead to smoking initiation, no.
6 Q. So your answer is no, that none of the
7 advertising or promotional vehicles that we have
8 discussed should be banned for cigarette
9 manufacturers, correct?
10 A. At this point in time, correct.
9:06:00 11 Q. How about restricted, should any of those forms
12 of advertising and promotions be restricted,
13 vis-a-vis cigarettes?
14 A. In what form?
15 Q. In any form.
16 A. Again, that's going to call for an opinion.
17 Q. Yes, and you're an advertising expert and I'm
18 asking for your opinion.
19 A. Well, a personal opinion? Sorry.
20 Q. I assume your personal opinions are to some
21 extent formed by your expertise in advertising,
22 correct?
23 A. To some extent. Again, I would say that
24 personally -- in looking at this I would say that you
25 have to look at research evidence, and only I would
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9:07:00 1 personally view that you would only want to limit
2 speech, if indeed there was evidence, and that in
3 this case there appears to be no credible evidence to
4 indicate that it leads to smoking initiation.
5 Q. How about smoking continuance?
6 A. Same thing.
7 Q. So it's your testimony that there is no credible
8 evidence that advertising has an impact on smoking
9 initiation or smoking continuance?
10 A. Correct.
11 Q. Is it further your testimony that advertising
12 and other promotions have no impact on smoking
13 initiation or smoking continuation?
14 A. Again, at this point in time it would appear
9:08:00 15 that there is no credible evidence to indicate that
16 they do, that they have impacted on that.
17 Q. So it's your testimony that none of the
18 cigarette advertising has any impact on whether a
19 person begins to smoke or continues to smoke,
20 correct?
21 A. I'm sorry. Could you repeat that?
22 MR. O'FALLON: Read it back.
23 (Record read.)
24 THE WITNESS: Again, at this point
25 I've seen no evidence that would indicate that it
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1 does.

2 BY MR. O'FALLON:

3 Q. And it's further your testimony that none of the
4 promotional or other marketing activities of the
5 cigarette manufacturers have any effect on whether a
6 person starts to smoke or continues to smoke,
7 correct?

8 A. Again, I've seen no evidence to that effect,
9 correct.

10 Q. Let's go take a look at your resume for a
9:09:00 11 minute. That's part of Exhibit 3313, correct?

12 A. Correct.

13 MR. O'FALLON: I'd just like to start
14 with one issue, and that's the provision of your
15 journal articles and other publications, and I
16 believe that counsel is going to help me on this.

17 It's my understanding that you will be
18 producing the publications listed in the resume, is
19 that true?

20 MR. PURVIS: That's correct. They
21 should be here shortly.

22 MR. O'FALLON: Are there any you won't
23 be producing?

24 MR. PURVIS: We haven't been able to
25 locate a few and our efforts to locate them are

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1 continuing.
2 MR. O'FALLON: Can you tell me which
3 ones you haven't been able to locate so I have some
4 denotation of that?
5 MR. PURVIS: I can't tell you. I
6 don't know.
7 MR. O'FALLON: But you're expecting a
8 Federal Express sometime this morning?
9:10:00 9 MR. PURVIS: Yes.
10 MR. O'FALLON: And we can go through
11 it at that time?
12 MR. PURVIS: Sure.
13 BY MR. O'FALLON:
14 Q. Dr. Faber, is the document attached as part of
15 your expert report entitled Curriculum Vitae, Ronald
16 J. Faber, a current up-to-date resume?
17 A. There is probably a couple very minor additions
18 that have occurred since this was submitted.
19 Q. Why don't you tell me what those would be.
20 A. Okay. The -- let's see. On page 9 conference
21 paper presented -- to be presented has been
22 presented. Same thing with the one below that.
9:11:00 23 And in addition, another conference paper was
24 presented at the Association for Education and
25 Journalism Mass Communication Conference.
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1 Q. What was the name of that paper?

2 A. I don't recall the title off the top of my head.

3 Q. What was the topic?

4 A. Political advertising. Well, the previous '96
5 political campaigns.

6 Q. And just so that the record is clear, the paper
7 listed on page 9 as Censorship of Political
8 Advertising: A Third-Person Effect that was
9 indicated as to be presented has now been presented,
10 correct?

11 A. That is correct.

12 Q. And it was presented on the date listed here,
13 August of '97, correct?

14 A. Yes, I believe that's correct.

15 Q. Further, the second paper, Advertising and
16 Eating Disorders: A Path Less Taken that is also
17 listed as to be presented now has been presented,
18 correct?

9:12:00

19 A. That's correct.

20 Q. Are those two papers are among the articles that
21 you're going to be getting to us?

22 MS. TYLER: No, they are not. And the
23 conference papers and invited presentations, those
24 are not published materials. They will not be
25 provided. They are not publicly available.

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1 BY MR. O'FALLON:

2 Q. Doctor, do you have drafts of those papers?

3 A. I probably have some of them.

4 Q. Do you think you have those that are most recent
5 listed?

6 A. The second one, no, that was more of a
7 presentation and -- so there was no final draft of
8 that paper. The one above, I'm not sure.

9 Q. Are those presentations recorded in any way, do
10 you know; for instance, was the one that you gave on
11 Advertising and Eating Disorders; A Path Less Taken
12 that was presented to the American Academy of
13 Advertising recorded in any way?

14 A. It was presented to the American Academy of
15 Advertising. What do you mean by recorded?

16 Q. Videotaped?

17 A. No.

18 Q. Did you submit any materials?

19 A. There is probably an abstract of it.

20 Q. Anything else that you would have submitted?

21 A. Not that I can recall, no.

22 Q. What was that paper generally about?

23 A. It was about a way in which eating disorders may
24 occur in relationship to advertising.

25 Q. What generally was your discussion about or your
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9:14:00

1 conclusions; what conclusions did you reach?
2 A. That there is worth investigating the role of
3 role portrayal in terms of work.
4 Q. I'm not understanding what you're talking about.
9:15:00 5 A. That changing role portrayals --
6 Q. Leads to eating disorders?
7 A. Not directly, indirectly.
8 Q. Explain to me how that happens.
9 A. In that particular paper we are looking at the
10 fact that in society there is a changing role for
11 women; that is society's role for women has changed.
12 That may have created stress, and that stress is a
13 factor that leads to eating disorders.
14 Q. What role does advertising play?
15 A. It shows what society's values are among other
16 sources.
17 Q. So advertising in the context of your paper in
18 that sense creates an image of what the modern woman
9:16:00 19 should be like, correct?
20 A. It reflects what values of the times are.
21 Q. And in part creates an image, right?
22 A. It reinforces the images that are elsewhere
23 available, but it is consistent.
24 Q. And, in fact, can do it in a much more
25 persuasive way through the media, correct?

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1 MR. PURVIS: Object to the form.

2 THE WITNESS: Actually in a much less
3 persuasive way.

4 BY MR. O'FALLON:

5 Q. So your basic conclusion was that this is
6 something we should study, this effect that has
7 advertising in creating an image of women and the
8 role it would play in terms of eating disorders,
9 correct?

10 A. Could you say that again?

11 MR. O'FALLON: Why don't you read it
12 back.

13 (Record read.)

9:17:00

14 BY MR. O'FALLON:

15 Q. So if I understand you correctly, you're
16 recommending that further studies should be done on
17 this image that advertising has helped create of
18 modern women that may, in fact, lead modern women to
19 have eating disorders, correct?

20 MR. PURVIS: Object to the form.

21 THE WITNESS: Our basic conclusion was
22 that research should be done to examine this path,
23 that role -- stress might lead to eating disorders.
24 Advertising here simply reflects society's values.

25 BY MR. O'FALLON:

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1 Q. Or helps create society's values; isn't that
2 true, sir?
3 A. Generally advertising is perceived as following
4 rather than creating.
5 Q. Advertising can certainly create images for its
6 products, correct?
7 A. Are you talking about brand advertising?
9:18:00 8 Q. I'm talking about any advertising, sir.
9 A. Well, there is a difference between brand
10 advertising in product categories.
11 Q. Any advertising can help create a perception of
12 the given product or the people who use that product;
13 isn't that true?
14 A. Again, it's typically in regard to brands not in
15 regard to products. If we're talking brands, what
16 can create an image --
17 Q. You talked about computers and you talked about
18 Dell and Compaq as an example. Do you consider Dell
19 and Compaq advertising to be solely brand
20 advertising?
21 A. Yes.
22 Q. You don't think the first thing that Dell and
23 Compaq have to do is convince you and I that we have
24 to have a computer before we worry about what brand
25 computer?

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1 A. I think Dell and Compaq generally already assume
2 they want a computer.
3 Q. Is it your position they don't think at all in
4 creating in me or other people a want or a desire for
5 a computer?
6 A. I can't tell you what Dell and Compaq think.
7 Q. You certainly could have looked at their
9:19:00 8 advertising and internal advertising structure and
9 evaluated that, correct?
10 A. Could I have, yes.
11 Q. Sure. And you can also take a look around and
12 look at the advertising yourself and say, do these
13 advertising in part create or attempt to create a
14 desire for a computer, correct?
15 A. Okay.
16 Q. Well, that's true, isn't it?
17 A. What I see their advertising is looking at is
18 people who have made the decision for a computer and
19 trying to demonstrate that this is what they offer
20 and hope that that matches what people want.
21 Q. The vast majority of people that Compaq and Dell
22 advertise to have not made the decision to get a
23 computer yet, correct?
24 A. I do not believe that to be true. It depends
25 what you mean by advertised to.

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1 Q. They have broad based advertising, don't they,
2 sir?
3 A. Can we distinguish between people who see the
4 advertising versus people who are targeted by the
5 advertising or people who are --
6 Q. Why?
7 A. Well --
8 Q. Why do we do that? Do you think the people who
9 look at advertising make that distinction? The fact
10 of the matter is when you put out advertising in a
11 public form all of us see it, correct?
12 A. Yes, but some notice to a greater extent.
13 Q. That doesn't necessarily mean you notice it
14 simply because, for instance, you want a computer,
15 does it?
16 A. Yes. If you want a computer you are much more
17 likely to notice it.
18 Q. If there is a really good looking woman sitting
19 next to a computer, whether I want a computer or not,
20 don't you think it's fairly likely that I would
21 notice it?
22 A. I don't know.
23 Q. That would sure be a reasonable assumption,
24 wouldn't it?
25 A. Well, first I'm not sure that any -- I can think
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1 of any computer ads that are doing that. And
2 secondly -- well, I'm not sure that that would be
3 necessarily true. It would depend.
4 Q. So you don't think that the computer industry
9:21:00 5 has in general created or helped create a need for
6 their computers that -- for computers in general?
7 A. I think predominantly the computer industry is
8 selling computers to people who have made the
9 decision that they want computers.
10 Q. Don't computer ads to some extent emphasize
11 notions that with a computer your life will be easier
12 or better?
13 A. As I sit here and think of computer ads I've
14 seen, I don't recall one that does that.
15 Q. How about over the last fifteen years? The
16 computers are a relatively new thing. We all managed
17 to live our lives in the Seventies without them and
18 subsequently now we find them irreplaceable.
19 Is it your testimony computer advertising has
20 had nothing to do with that?
21 A. At the very beginning when it was a new brand it
22 helped make people aware that such a thing existed.
9:22:00 23 It helped to get perhaps media coverage which helped
24 to make people aware of that.
25 As computers become more an intricate part of
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1 people's daily existence, their ability to stimulate
2 any kind of primary demand is diminished.

3 Q. But it still occurs, doesn't it?

4 A. At this point in the computer industry I
5 couldn't tell you.

6 Q. When was the last time you did any research on
7 the computer industry advertising?

8 A. What do you mean by research?

9 Q. What do you mean by research?

10 A. Well, what I mean by research is setting up a
11 research design, testing hypothesis.

12 Q. Have you ever done any research on computer
13 advertising by your definition?

14 A. None that I recall.

15 Q. And yet you're willing to state in your opinion
9:23:00 16 here that you believe all computer advertising is
17 solely brand advertising?

18 A. I've stated in my opinion that computer
19 advertising I can think of is brand advertising.

20 Q. Well, I don't think that you stated - quote - I
21 think - end quote - in your expert report, so were
22 you just simply picking one or two computer ads that
23 you had seen recently in saying that well, I think
24 one or two computer ads are clearly brand
25 advertising?

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1 Did you go out and survey all the computer
2 advertising in a given year; did you do that?
3 A. No.
4 Q. How about one given month?
5 A. No.
6 Q. How about one given week?
7 A. No.
8 Q. So you haven't done a thorough survey of any
9 computer advertising, correct?
10 A. Can I take a minute and see what I said about
11 it?
12 Q. Sure. I think it's on page 27. You say
13 secondary demand refers to advertising's role in
14 influencing the brand choice of those people who
15 already plan to buy a product, correct?
16 A. Correct.
17 Q. So what you're using here in your opinion is
18 IBM, Compaq and Dell computer advertising is a sample
19 of what you consider to be brand advertising,
20 correct?
21 A. I'm using them as examples, yes.
22 Q. At no time have you actually done a summary
23 review of even one week's worth of advertising for
24 IBM, Compaq or Dell, correct?
25 A. That's correct.

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1 Q. So you may be basing that opinion on simply one
2 or two ads you may have seen?
3 A. I believe it's more than that.
4 Q. But you don't know how many, do you, sir?
5 A. I don't know an exact number, no.
6 Q. You haven't done any research into whether or
9:26:00 7 not IBM, Compaq or Dell computer advertising is, in
8 fact, brand advertising, have you?
9 A. The IBM, Compaq and Dell ads that I've come in
10 contact with are examples of brand advertising. I
11 have seen no evidence that any of those try to do
12 anything else, but they are there as examples of
13 brands that try to stimulate brand advertising.
14 Q. So you think that you can tell simply by looking
15 at an ad whether it's trying to encourage me to pick
16 IBM as opposed to Dell or whether it's trying to say
17 to me please, buy a computer?
18 A. When a brand lists all of its specifications, I
19 believe that that's an attempt to try to show you
20 what that brand offers.
21 Q. How do you make that kind of a determination,
22 sir; how do you do that?
23 A. I do it as an individual, but it's generally
9:27:00 24 accepted within the literature.
25 Q. What literature will I find that says it's
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1 generally accepted that IBM, Compaq and Dell
2 computers are brand advertising?

3 A. Well, advertising textbooks would generally use
4 these as examples of brand advertising.

5 Q. Why don't you list the textbooks you're talking
6 about.

7 A. I wouldn't want to give you specifics of which
8 ones are used as examples.

9 Q. Is it possible none of them use that example?

10 A. I would be very surprised.

11 Q. But you can't really testify as you sit here one
12 way or the other whether they do use this as an
13 example?

14 A. As I sit here, no, I can't tell you.

15 Q. As far as you know there has been no real
16 research as you've defined it where you test a
17 hypothesis that this is brand advertising by taking
18 those ads out and having people look at them, and
19 saying does this only cause you to pick only a Dell
20 as opposed to a Compaq or does this --

9:28:00 21 A. I am not familiar with any research that looks
22 at that.

23 Q. So you're not familiar with any research where
24 someone's actually went out and tested their
25 advertising and said to people - focus groups - does

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1 this ad cause you to want to buy our computer or does
2 this ad cause you to want to look at a computer or
3 buy computers in general?

4 MR. PURVIS: Object to the form.

5 THE WITNESS: I'm sorry. Could you
6 repeat that?

7 BY MR. O'FALLON:

8 Q. As far as you know there has been no research -
9 and I assume you're talking academic research - that
10 has been done on whether or not the examples you use,
11 IBM, Compaq or Dell computer, their advertising
12 attempt to simply get a consumer to pick their
13 product as opposed to another manufacturer's similar
14 product, or whether it's designed to, in fact,
15 encourage them to want the product generically and,
16 of course, their product specific?

9:29:00

17 A. There is research that looks at those products
18 and the impact it has on brand preference. I don't
19 know of any research that looks at desire to buy a
20 computer generically.

21 Q. You would have to agree with me that in order
22 for me to want to buy a computer someone has to
23 demonstrate to me that a computer has value, correct?

24 A. Not necessarily someone, but most likely.

25 Q. And the person most likely to try to do that is

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1 someone who manufactures those computers and wants to
2 sell me those computers, correct?

3 A. Nope.

4 Q. You disagree with that?

5 A. Correct.

6 Q. You don't think -- you would agree with me that
7 a manufacturer of a computer is among those group of
8 people who would want to show me the value of buying
9 a computer, correct?

10 A. Predominantly they would want to show you the
11 value of buying their computer.

12 Q. First they've got to get me to step one; they
13 have to get me to the point where I want a computer,
14 don't they?

15 A. Typically other sources will do that.

9:30:00 16 Q. It's your testimony that advertising has no
17 impact on whether I will want a computer?

18 A. I am not familiar with any research that would
19 indicate that it would.

20 Q. So it would be your testimony that there hasn't
21 been any computer that has either attempted or been
22 successful at encouraging individuals to want
23 computers?

24 MR. PURVIS: Object to the form of the
25 question.

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1 THE WITNESS: I'm sorry. Could you
2 restate that?

3 MR. PURVIS: I think you misspoke.

4 MR. O'FALLON: I may have. Let's try
5 it again.

6 BY MR. O'FALLON:

7 Q. It's your testimony that computer advertising,
8 all computer advertising, has not played a role in
9 people's desire to want computers?

10 A. Ever?

9:31:00 11 Q. Ever.

12 A. I don't know that I can say that. I don't know.

13 Q. How about in the last ten years?

14 A. I don't know.

15 Q. How about the last five years?

16 A. I've seen no evidence of it. Other than that, I
17 don't know.

18 Q. What evidence would you need?

19 A. Some research that would indicate that there is
20 an effect on generic desire.

21 Q. And has that research been done or not?

22 A. I'm not familiar with it.

23 Q. So you can't tell me that, in fact, advertising
24 for computers doesn't create a desire for computers,
25 all you can tell me is no one has published any

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1 literature on that, correct?
2 MR. PURVIS: Object to the form.
3 THE WITNESS: I don't think that's
4 what I was saying here.
5 BY MR. O'FALLON:
6 Q. Is that true?
7 A. I'm sorry. Can you say it again?
8 MR. O'FALLON: Would you read it back?
9 (Record read.)
9:33:00 10 THE WITNESS: I can only give you my
11 opinion on what I know to be true or not true or
12 factual or not, and I've seen no evidence of that.
13 BY MR. O'FALLON:
14 Q. So when you say you've seen no evidence you mean
15 that you've seen no research published in the
16 literature, correct?
17 A. Correct.
18 Q. You haven't went to Dell or Compaq and said can
19 I see your internal advertising documents and your
20 internal focus groups and the result of those
21 internal focus groups, right?
22 A. No.
23 Q. You understand that manufacturers conduct focus
24 groups to see whether their advertising is effective
25 or not, correct?
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1 A. They do that to see if their brand advertising
2 is effective, yes.
3 Q. Wouldn't they also want to see whether it's
4 creating a generic desire for computers?
5 A. Generally, no.
6 Q. What do you base that opinion on, sir?
7 A. Understanding and talking to people in
8 advertising as well as my knowledge.
9 Q. Talking to what people?
10 A. Professionals.
11 Q. Wouldn't you agree that it's in the
12 manufacturers's interest to create and expand the
13 market first and then try to compete for a share of
14 that market?
15 A. Most advertising is aimed simply at trying to
16 create brand preference. Only very early in the
17 existence of a product might it be concerned
18 generically.
19 Q. How many people right now own computers?
20 A. I don't know.
21 Q. It's really not that large a number, is it?
22 A. I don't know.
23 Q. You would agree that there is still a great deal
24 of untapped potential for people to own computers,
25 correct?

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9:35:00

- 1 A. Hard to say where the diffusion will end.
2 Q. You would agree before Dell can sell its
3 computers it has to convince people that they should
4 buy a computer, correct?
5 A. It doesn't necessarily try to do that. People
6 would need to have a desire for computers which would
7 come from many sources.
8 Q. And you're going to say -- and certainly a
9 person's desire for a computer will in part be
10 affected by advertising, correct?
11 A. I don't know. I can't tell you because I've not
12 seen any evidence that it does right now.
13 Q. You just haven't seen a study on that particular
14 subject, correct?
15 A. Correct.
16 Q. So you're not saying that it doesn't exist,
17 you're just saying that no one's published an article
18 about it, right?
19 A. I'm saying that in order to give you my opinion
20 I have to do it on the basis of the best evidence
21 that I'm aware of and available.
22 Q. And you would think the best evidence would be
23 limited to what, publicly published research results
24 or --
25 A. I would think that that would be where it would

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9:36:00

1 be most likely to be found, yes.

2 Q. When you do research you want not only what you
3 would consider - quote - unquote - the best evidence,
4 you want all evidence, don't you?

5 A. Yes.

6 Q. For instance, if you're going to evaluate an
7 advertising campaign, you would want to know as much
8 about that advertising campaign as possible, right?

9 A. Could you explain what you mean by evaluate an
10 advertising campaign?

11 Q. Have you ever evaluated an advertising campaign?

12 A. Yes.

13 Q. Who did you do that for?

14 A. I do it as part of my work for the EFFIE awards.

15 Q. And when you do that work you're only really
16 looking at the publicly available information,
17 correct?

18 A. No, not in that case.

19 Q. Do you go and get -- for instance, when you
20 evaluate the EFFIE awards do you know what
21 manufacturers targeted audiences?

22 A. Yes.

23 Q. How do you find that out?

24 A. They tell you.

25 Q. Do they give you all their back-up information

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9:37:00

1 concerning how they went about designing that
2 campaign?

3 A. Not all of it.

4 Q. Do they give you their result of their focus
5 groups both before and after the campaign to tell
6 whether or not it's been effected in accomplishing
7 its desired goals?

8 A. Some.

9 Q. Do they give you all the goals?

10 A. I don't know.

11 Q. If you were going to evaluate an advertising
12 campaign or advertising campaigns and reach
13 conclusions about those campaigns you would certainly
14 want every piece of information about that campaign
15 you could get your hands on, correct?

16 A. If my goal was to determine if that advertising
17 campaign achieved the objectives of that advertiser,
18 which is only one of many ways we could evaluate
19 advertising, then yes, if that's what you mean by it.

20 Q. You would agree that the advertiser is probably
21 the best source of the goals of an advertising
22 campaign, correct?

23 A. Yes.

24 Q. You realize that most advertisers when they
25 spend significant amounts of money on advertising or

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9:38:00 1 other promotions then test those advertisements to
2 see whether or not they are, in fact, accomplishing
3 the goals, correct?
4 A. Some.
5 Q. You would agree that the ultimate goal of any
6 advertising campaign is sales, correct?
7 A. No.
8 Q. That's true. One of the goals of most
9 advertising campaigns is sales, correct?
10 A. Correct.
11 Q. And so one way of measuring the effectiveness of
12 an advertising campaign is to determine whether the
13 particular product has an increase in sales among the
14 target audience, correct?
15 A. If you're trying to evaluate the effectiveness
16 of brand advertising, yes.
17 Q. It wouldn't just have to be brand advertising
18 would it, sir?
19 A. Yes, it would.
20 Q. So again, let's just come back to a basic
21 notion. It's your testimony -- are you saying that
22 brand advertising is exclusive of what you call
9:39:00 23 primary advertising, that you can't do both at the
24 same time?
25 A. I wouldn't say that you can't.

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1 Q. In fact, most advertisements do both at the same
2 time, don't they, sir?
3 A. No, I wouldn't say that.
4 Q. You would agree that an ad for roller blading
5 has as its goal, one, to convince you that you want
6 to become a roller blader and number two, if you're
7 going to be one you want to buy our products correct?
8 A. I don't know the goals of roller blading.
9 Q. It would seem to make sense, wouldn't it, just
10 as a matter of living in the universe and common in
11 essence?
12 A. Not necessarily. It's possible, but not
13 necessarily.
14 Q. You would understand fifteen years ago no one
15 roller bladed, wouldn't you?
16 A. Probably.
17 Q. You understand now a lot of people roller blade,
18 don't they?
19 A. Correct.
20 Q. Is it your testimony that advertising played no
21 role in us going from basically no roller blading to
22 a whole lot of roller blading today?
23 A. I don't know.
24 Q. It would be reasonable to assume that
25 advertising did play a role, correct?

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1 A. Initially it's possible. I don't know.
2 Q. How long can an initial period last?
9:40:00 3 A. Usually during the growth period.
4 Q. Well, roller blading is still growing, isn't it?
5 A. I don't know.
6 Q. Well, it's kind of reasonable. In your
7 neighborhood -- are you close to the lakes over in
8 Minneapolis?
9 A. Yes.
10 Q. There are more people roller blading around
11 those lakes this year than there were ten years ago,
12 aren't there?
13 A. I don't know.
14 Q. Five years ago?
15 A. I don't know.
16 Q. Three years ago?
17 A. I don't know.
18 Q. Let's go back to your resume for a moment. I'd
19 like to talk a little bit about your academic career.
20 Actually let's go back.
21 Before your academic career started which
22 appears to have started in January of 1980, correct?
23 A. You're talking about teaching positions?
9:41:00 24 Q. Teaching.
25 A. Yes.

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1 Q. Prior to that time where did you work?
2 A. At the University of Wisconsin.
3 Q. Have you held any jobs outside academia ever?
4 A. Yes.
5 Q. Any jobs other than -- what jobs were those?
6 A. I was a teacher.
7 Q. When were you a teacher?
8 A. High school teacher. I think 1971 to -- '71 and
9 '72.
10 Q. What other jobs have you held?
11 A. I was a research assistant.
12 Q. For who?
13 A. Marketing Science Institute.
14 Q. What is the Marketing Science Institute?
15 A. It's a research organization.
9:42:00 16 Q. Who funds it?
17 A. I believe a number of different member companies
18 do.
19 Q. Who would those member companies be?
20 A. I don't know offhand.
21 Q. Are there any from the cigarette industry?
22 A. I don't know.
23 Q. So they could have funding from the cigarette
24 industry?
25 A. I have no idea. I don't know. I don't know
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1 what principal companies are.
2 Q. In any event, it's privately funded by
3 corporations, correct?
4 A. That's one source of funding.
5 Q. What are the other sources of funding?
6 A. Research grants.
7 Q. From who?
8 A. Government organizations, universities.
9 Q. How big an institute is it; how many people were
10 working there when you were there?
11 A. I don't know exactly.
12 Q. Give or take.
13 A. I guess fifty.
14 Q. What did you work on when you were there?
15 A. Research on children in advertising.
16 Q. What products in particular did you look at?
17 A. Various research studies. There were probably
18 many.
19 Q. Why don't you give me the ones you recall.
20 A. Products? Off the top of my head I don't
21 recall.
22 Q. You must recall some.
23 A. That was not the major focus of our research.
24 Q. Well, I thought you testified that that's what
25 you worked on.

9:43:00

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1 A. It's basic research on children and advertising.
2 Q. Okay. What does that mean?
3 A. Look at the processes of children's
4 understanding of advertising.
5 Q. What else?
9:44:00 6 A. We looked at relative effects of varying
7 sources.
8 Q. Like what?
9 A. Parents.
10 Q. What else?
11 A. Siblings.
12 Q. What else?
13 A. Peers.
14 Q. What else?
15 A. Those are the things that immediately come to
16 mind.
17 Q. I assume advertising was in there some place
18 since it was --
19 A. Yes. I'm sorry.
20 Q. But as you sit here today you can't remember any
21 products you looked at?
22 A. Again, that wasn't the focus of our research.
23 Q. So your focus wasn't to determine whether or not
24 advertising was effective?
25 A. Again, that has many meanings. It depends what
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9:45:00 1 you mean by that.
2 Q. What do you think it means?
3 A. Well, we can talk about whether specific
4 advertising campaigns have effects.
5 Q. Did you evaluate any of that while you were at
6 the Marketing Science Institute as to whether
7 specific advertising campaigns had effects on
8 children?
9 A. No.
10 Q. Did you look at just generically whether
11 advertising had an effect on children?
12 A. Yes.
13 Q. What did you conclude or what did you find from
14 that?
15 A. That there are critical ages.
16 Q. Critical ages for what?
17 A. For children's understanding and meaning of the
18 message or messages.
19 Q. Why don't you tell me what those critical stages
20 are.
21 A. They generally follow Piaget stages.
22 Q. Tell me what those stages are.
9:46:00 23 A. Sensory motor stage.
24 Q. What age is that?
25 A. It varies, but it's generally zero to two.

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1 Q. Is any advertising effective at that age?

2 A. Generally children don't pay a lot of attention
3 to it.

4 Q. Is there some advertising that does get through
5 at that age?

6 A. I'm not sure what you mean by get through.

7 Q. They understand that it has any impact on them
8 whatsoever?

9 A. We didn't look at zero to two year olds.

10 Q. What's the next stage?

11 A. Next stage would be pre-operational.

12 Q. How do you define that?

13 A. There is numerous ways, but generally
14 pre-operational children have limited capabilities.

9:47:00 15 Q. Meaning what?

16 A. Well, classic task is they don't have good
17 conservation tasks, they can't determine that
18 similar -- it's generally the standard task of a
19 conservation of the liquids task.

20 Q. What skills do they or don't they have at this
21 pre-operational stage that affects their ability to
22 comprehend advertising?

23 A. At that age?

24 Q. Yes.

25 A. We would say that probably they are limited in
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1 what they focus on.
2 Q. What is that general age?
9:48:00 3 A. Generally about -- pre-op is generally about
4 three to -- best of my recall it's about five or six.
5 Q. During this pre-operational stage from the ages
6 of three or five to six do these children have some
7 ability to comprehend and retain advertising?
8 A. Yes.
9 Q. What type of advertising is most effective with
10 this group of people?
11 A. I couldn't tell you.
12 Q. Do these -- you didn't study that at all?
13 A. I'm not sure what you mean by that.
14 Q. Did you ever study the pre-operational age group
15 to determine what messages they did or did not
16 comprehend from advertising?
17 A. We looked more at the degree of recall that they
18 had from messages and understanding.
9:49:00 19 Q. What kind of messages did they have the best
20 recall for?
21 A. We didn't compare different messages.
22 Q. You just determined whether they did or didn't
23 have a recall ability?
24 A. Yeah.
25 Q. And what?

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1 A. How much they recall.
2 Q. So you looked at them and tried to determine
3 what they recalled and how much of it they recalled,
4 correct?
5 A. Correct.
6 Q. What were your general findings?
7 A. That younger children, pre-operational children,
8 tend to have more uni-dimensional recall.
9 Q. Meaning what?
10 A. They recall fewer things.
11 Q. When you say "they recall fewer things," what
12 exactly does that mean?
13 A. They might remember one element of an ad.
14 Q. Do they have a tendency to be able to recall ads
15 more or less than people in the next age group up?
16 A. Less.
17 Q. So in general their level of recall is lower
9:50:00 18 than, for instance, a seven year old would probably
19 be, correct?
20 A. Somewhat in the next stage.
21 Q. Is it fair to say that more uni-dimensional
22 advertising is easier to recall by them?
23 A. No.
24 Q. Is there any kind of advertising that was easier
25 for them to recall?

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9:52:00

- 1 A. More likely to recall concrete things.
2 Q. Like a symbol or a character?
3 A. That might be one thing.
4 Q. But in general you would agree that this age
5 group, three to six years old, would not, generally
6 speaking, have a great recall of advertising,
7 correct?
8 A. Correct.
9 Q. Does repetition have an effect on how much they
10 recall?
11 A. When we talk about recall of advertising?
12 Q. I assume you were testing specific ads.
13 A. Are you talking amount that they recall or just
14 recall any ad? Those are different things.
15 Q. I think recall first of all an ad.
16 A. I'm sorry. And your specific question regarding
17 that was?
18 Q. That they have a reduced level to recall any one
19 specific ad?
20 A. I don't know that I can say that.
21 Q. You didn't study that?
22 A. Correct. I don't recall -- well, I don't recall
23 any results regarding that.
24 Q. Is it your general understanding that children
25 ages three to six have a lessened ability to recall

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1 ads period?
2 MR. PURVIS: Object to the form.
9:53:00 3 THE WITNESS: That was not my
4 testimony or my statement, no.
5 BY MR. O'FALLON:
6 Q. What is your understanding?
7 A. That they recall less of an ad is what I was
8 referring to.
9 Q. Have you ever looked at whether or not they have
10 less ability to recall ads period as opposed to just
11 how much of the ads they recall? Just ads period,
12 has that ever been tested by you?
13 A. By me, no.
14 Q. Do you have research that you know of on that
15 particular subject?
16 A. I know there is research about that.
17 Q. What does it generally indicate?
18 A. It generally indicates that young children from
19 a large number of ad exposure will recall fewer than
20 when they were younger.
21 Q. So would it be safe to say that just in the
22 every day environment where we're exposed to
23 advertising a younger child would recall less than,
24 for instance, a seven year old, correct?
25 A. It's possible, yes.

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9:54:00 1 Q. You would agree that repetition would affect the
2 level of recall by younger people, correct?
3 A. By all people, yes.
4 Q. So repetition really has an impact on how much
5 of advertising any of us see, correct?
6 MR. PURVIS: Object to the form.
7 THE WITNESS: I'm not sure what you
8 mean by see. Is that what you meant? How much we
9 see?
10 BY MR. O'FALLON:
11 Q. How much we see, hear, those are the basic ways
12 in which we perceive advertising, correct?
13 A. I'm not quite sure exactly what you mean by
14 that. It has a couple meanings.
15 Q. Why don't we repeat my question. Repetition has
16 an impact on how much of an advertising campaign or
17 advertising we recall, correct?
18 A. It can.
19 Q. Didn't it?
20 A. To a degree, to a point.
9:55:00 21 Q. To a point of basically we have seen so much of
22 it it can't get any greater?
23 A. Actually there is a point where it has no longer
24 an increased effect.
25 Q. Once the advertising is so pervasive that we
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1 really can't have much effect from seeing it one more
2 time, correct?

3 A. In terms of recognition, correct.

4 Q. And recall?

5 A. And recall.

6 Q. And again, the level of recall of advertising
7 decreases as you get younger, correct? I'm sorry.

8 The level of recall for advertising decreases as you
9 get younger; in other words, a younger person has
10 less ability to recall than an older person under the
11 age of eighteen?

12 A. Correct. Under the age of what?

13 Q. Eighteen.

14 A. Well, the differences would be much younger than
15 that.

16 Q. In any event a three year old is going to have
17 less ability to recall an advertising campaign than a
18 seven year old, correct?

9:56:00 19 A. I can't say that.

20 Q. It would depend on whether the advertising
21 campaign is so pervasive that they would both be able
22 to recall it, correct?

23 A. It's possible, yes.

24 Q. But assuming the advertising isn't pervasive,
25 that is the advertising hasn't reached the saturation

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1 point, a three year old is going to have less ability
2 to recall advertising than a seven year old, correct?

3 A. Again, we're talking about recall having seen
4 the ad or recall the ad where we're talking specific
5 information from the ad.

6 Q. All three.

7 A. Well, there is differences in terms of whether
8 saturation point makes a difference or not.

9 Q. Okay. Well, let's take them one at a time. A
10 three year old is going to have less ability than a
11 seven year old to recall having seen an ad assuming
12 the ads are below the point of saturation, correct?

9:57:00

13 A. If we're talking single exposure.

14 Q. What do mean single exposure? No, I'm not
15 talking about -- I assume the pervasiveness of the
16 advertising is well above single exposure, right?

17 A. Generally most research looks at single
18 exposure.

19 Q. So most research doesn't really look at the
20 world as it is?

21 A. It looks at different kinds of issues, and for
22 some issues that's relevant and some issues that's
23 less relevant.

24 Q. Is it safe to say that a three year old has less
25 recall than a seven year old?

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1 A. Again, it depends what you mean by recall and
2 recall of what.
3 Q. Why don't you go ahead and define recall for me
4 and we will get the definitions and I'll ask them one
5 at a time.
6 A. Well, we're going to use recall in terms of
7 un-aided awareness and more critically --
8 Q. Keep going.
9:58:00 9 A. That's fine for the definition of recall.
10 Q. So your recall is un-aided awareness, correct?
11 A. Correct.
12 Q. Tell me what un-aided awareness means to you.
13 A. When prompted without an indication of what
14 someone is looking for, the desired information is
15 elicited.
16 Q. How would that be done in the context of, for
17 instance, an advertising campaign for a product
18 that's already on the market? How would you do that?
19 A. I might ask -- well, depends. There is a lot of
20 ways to do that. One way would be if we were to do
21 day after recall, could call up people and who were
22 say watching television and ask, do you remember
23 seeing ads during a particular program.
9:59:00 24 Q. How would you do it with kids?
25 A. Un-aided recall?

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1 Q. Yes. I assume you did some of that work at the
2 Marketing Science Institute.

3 A. Correct.

4 Q. How did you do it there?

5 A. We might ask, and it wouldn't have been complete
6 un-aided recall, but we might have again a product
7 prompt. We might have asked what ads do you recall
8 for orange juice.

9 Q. And when you ask these children what ads they
10 recalled for orange juice is it your recollection
11 that the three year old recalled less ads than the
12 seven year olds?

13 A. I don't recall that we would have looked at how
14 many ads they recall. We were looking for the --
15 what they recalled from ads.

16 Q. So again, you were primarily looking at the
17 amount that they recalled from the ads, right?

10:00:00 18 A. Correct.

19 Q. You never really tested whether they recalled
20 the ads or not?

21 A. That wasn't our primary interest.

22 Q. Do you have an opinion on whether using recall
23 as you've now defined had un-aided awareness; a three
24 year old has a greater ability or a lesser ability
25 than a seven year old to recall an ad?

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1 A. A specific ad or any?
2 Q. Is there going to be a difference?
3 A. There might, yeah.
4 Q. I'm asking for your opinion. We're not looking
5 at might here. I'm asking your opinion.
6 A. It's hard to answer without knowing specifically
7 what you're asking.
8 Q. What I'm specifically asking is whether a three
9 year old has lesser recall than a seven year old, as
10 you've defined it, in un-aided awareness?
11 A. As I've tried to point out, they could recall
12 many different kinds of things and in many different
13 situations and the answer would depend on that.
14 Q. So you can't testify as to whether generically
15 speaking a three year old has a greater ability or a
10:01:00 16 lesser ability to recall advertising than a seven
17 year old?
18 A. Again, it would depend -- I can testify
19 depending on what kind of recall we're referring to,
20 and I'm not sure what you mean by generic.
21 Q. Un-aided awareness.
22 A. Awareness of what is what I'm getting at. I'm
23 sorry.
24 Q. Un-aided awareness of whatever you're testing.
25 Have tests been done on the un-aided awareness
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1 amount of three year olds as compared like seven year
2 olds? Have those tests been done or not?
3 A. I'm sorry. The un-aided awareness of what?
4 Q. Of anything, advertising.
5 A. Yes.
6 Q. You're an advertising expert. We're talking
7 about advertising. What do those tests generally
8 conclude about the ability of a three year old as
9 compared to a seven year old to recall?
10 A. In general a seven year old can recall more
11 details.
12 Q. That's it?
10:02:00 13 A. They can recall more coherent message.
14 Q. Anything else?
15 A. I'm not sure what else.
16 Q. Has there ever been a study done on whether
17 three year olds have a greater or lesser ability than
18 seven year olds to recall trade characters?
19 A. Yes.
20 Q. What was the conclusion?
21 A. I believe generally older children recall --
22 have greater recall of trade characters than younger
23 children.
24 Q. What other kind of work did you do at the
25 Marketing Science Institute?

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10:03:00 1 A. We reviewed literature on children and
2 advertising.
3 Q. What type of literature?
4 A. All of the literature we could get our hands on.
5 It was predominantly academic literature.
6 Q. Anything else?
7 A. Those are generally the projects I worked on.
8 Q. Did the Marketing Science Institute ever take
9 public positions on whether advertising should be
10 restricted or limited in any way?
11 A. Not that I'm aware of.
12 Q. Were they ever asked?
13 A. I have no idea.
10:04:00 14 Q. Did they ever have any participation on whether
15 or not children's programs or advertising to children
16 should be regulated or contained in any way?
17 A. Not that I'm aware of.
18 Q. Did you ever have any research as to whether or
19 not children perceive the violent messages on TV?
20 A. At Marketing Science?
21 Q. Yes.
22 A. No.
23 Q. Did you ever compare the ability of children to
24 recall, for instance, cartoon characters as opposed
25 to other advertising while you were there?

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1 A. It may have been part of a project. It may have
2 been part of a broader research issue.

3 Q. Was it?

4 A. I would have to -- well, let me think about
5 that. As I sit here today I can't recall actually
6 looking at that.

7 Q. Do you recall doing any work with cartoon
8 characters and children and their ability to recall
9 those?

10 A. No.

10:05:00 11 Q. Again, you can't recall the specific name of any
12 specific corporation that funded research at the
13 Marketing Science Institute?

14 A. I believe General Electric did. That's about
15 the only one I can recall.

16 Q. Did any of the sponsors ever ask the Marketing
17 Science Institute to specifically review their
18 advertising?

19 A. Not to the best of my knowledge.

20 Q. You never did any of that?

21 A. No.

22 Q. And you left the Marketing Science Institute in
23 1976?

24 A. Yes, I believe so.

25 Q. And that was to go back to school?

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1 A. Correct.
2 Q. And were you then in school from 1976 to 1979?
3 A. Correct.
4 Q. Did you hold any other positions or other jobs
5 during that time period?
6 A. Yes.
7 Q. Where did you work?
8 A. At the university.
10:06:00 9 Q. Teaching assistanceships and that kind of thing?
10 A. Correct.
11 Q. Were you part of any grants or any specific
12 research projects during that 1976 to 1979 period?
13 A. Yes.
14 Q. What were you -- what were those projects first
15 of all?
16 A. Did a -- did one project on college -- it's
17 college student attitudes.
18 Q. To what?
19 A. News and entertainment, television to some
20 degree also. I believe there were questions about
21 that.
22 Q. What other projects did you do during that time
23 period?
24 A. I did a project on children and advertising, a
10:07:00 25 couple of those.

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1 Q. What projects did you do involving children and
2 advertising?

3 A. I was involved in research that looked at --
4 well, we did some work that looked at disclaimer
5 messages.

6 Q. What else?

7 A. Looked at some research looking at different
8 factors that related to children's understanding of
9 advertising.

10 Q. Anything else?

11 A. That's pretty much what I recall.

10:08:00 12 Q. I'm going to ask you about that in a second, but
13 I want to just go back to another area that we were
14 into and we went down the road and I want to come
15 back to it.

16 We were talking about the various stages of
17 child's understanding of advertising, and I think we
18 were up to the three to five or six age, what you
19 called the pre-operational stage.

20 A. If I could just correct you for a second or
21 correct the record for a second. They're not
22 directly -- they're related to children's
23 understanding of commercials, but these are stages of
24 child development.

25 Q. But you'll agree that the ability to understand
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1 advertising varies as the stages progress, correct?
2 A. Correct.
3 Q. What is the next stage after pre-operational?
4 A. It's referred to as concrete operational.
5 Q. What ages is that, concrete?
10:09:00 6 A. Roughly it's associated with ages about seven
7 until I believe around eleven or twelve.
8 Q. How would you define that particular stage of
9 development, especially as it relates to the ability
10 to understand advertising?
11 A. Typically children have a greater ability than
12 pre-operational children to understand advertising.
13 Q. Is their understanding literal or at this point
14 can they start to understand some of the imagery as
15 well?
16 A. It will depend what you mean by imagery.
17 Q. Wouldn't you agree that a lot of ads attempt to
18 convey images?
19 A. Yes.
20 Q. You've heard of image advertising, haven't you?
21 A. Yes.
22 Q. So in that context how would you define image
23 advertising?
24 A. Ones that try to relate a specific thought,
10:11:00 25 feeling or emotion to a brand.

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1 Q. Or a product, correct?

2 A. I'm trying to think of an example where it would
3 be a product. I generally can only think of examples
4 of brands.

5 Q. So going back to your previous testimony, if
6 someone's trying to invoke an image about a computer
7 or a computer user, it would be your testimony that
8 they're only invoking an image about a Dell computer,
9 not computers in general?

10 A. If one is engaging in image advertising they're
11 trying to associate their brand with a specific
12 image.

13 Q. Are you sure they're not also trying to
14 associate the general activity product with an image?

15 A. I couldn't say for certain what their objective
10:12:00 16 is.

17 Q. It would make sense that at least some
18 advertisers would try to do that, correct?

19 A. It's possible.

20 Q. Now, have you ever studied that by the way?
21 Have you ever studied whether or not image
22 advertising conveys only an image as to the specific
23 brand or whether it conveys an image of the user
24 overall product?

25 A. No.

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1 Q. Do you know if anyone else has done that
2 research?
3 A. I don't know.
4 Q. If it's been done you're not aware of it?
5 A. Correct.
6 Q. Now using image advertising as you've defined it
7 does this concrete operational group have an ability
8 to comprehend image advertising?
9 A. Some.
10 Q. Did the previous group, the pre-operational
11 group, have any ability to comprehend image
12 advertising?
13 A. Some.
14 Q. But much more limited than that of the people in
10:13:00 15 the concrete operational stage, that seven to eleven
16 stage, correct?
17 A. Correct. Or at least fewer of.
18 Q. So it would be fair to state that image
19 advertising would have more impact on the concrete
20 operational level individuals than it would on the
21 pre-operational adolescents, correct?
22 A. It would depend what you mean by impact.
23 Q. Ability to create the image that's attempting to
24 be created.
25 A. Correct.

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1 Q. What's the next stage of development?
2 A. Formal operations.
3 Q. How do you define that?
4 A. Typically.
5 Q. I'm sorry. Again, let me make the record clear.
6 How do you define that in terms of the ability of
7 this growth level to understand advertising?
8 A. Typically if one achieves formal operations
10:14:00 9 they're capable of understanding advertising in ways
10 that are exactly like adults would.
11 Q. What's this age group?
12 A. Generally around twelve or thirteen on up.
13 Q. Where would it cut off?
14 A. There isn't. It's the final stage.
15 Q. So we say adults are eighteen or over, would it
16 be twelve to seventeen?
17 A. It would be twelve to death.
18 Q. So basically at the age of twelve or thereabouts
19 you've reached the adult level of understanding,
20 correct?
21 A. Correct.
22 Q. So advertising aimed at, for instance, eighteen
10:15:00 23 to twenty year olds is going to have basically the
24 same impact as it would on twelve to seventeen year
25 olds, correct?

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1 MR. PURVIS: Object to the form.

2 THE WITNESS: Not necessarily.

3 BY MR. O'FALLON:

4 Q. Why?

5 A. This is simply one element of advertising.

6 We're talking about understanding.

7 Q. Well, is there any difference in ability to be
8 swayed?

9 A. There are a lot of factors that will influence
10 ability to be swayed.

11 Q. What are those factors?

12 A. Desire for the product category, previous
13 experience, brand loyalty.

14 Q. Anything else?

15 A. There is going to be like hundreds of them.

16 Q. Why don't you give me the ten most influential?

10:16:00 17 A. I don't know that I could do that. I don't know
18 how to rank order.

19 Q. Certainly there has to be some that are more
20 important than others generically speaking.

21 A. Again, it would depend on lots of factors and
22 situations.

23 Q. Generally what are they?

24 A. What are what?

25 Q. We're talking about I believe the factors that
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1 you -- you're willing to testify that there is a
2 difference in how twelve to seventeen year olds
3 perceive advertising then from, for instance, twelve
4 to twenty year olds; is that your testimony?

5 A. In some situations there may be.

6 Q. Unfortunately we have to deal with probability.
7 When is it more likely than not that a twelve to
8 seventeen year old who is going to perceive
9 advertising differently than an eighteen to twenty
10 year old?

10:17:00 11 A. Let's take for example a car. I forgot the age
12 range, but eighteen to whatever.

13 Q. Eighteen to twenty.

14 A. Okay. An eighteen to twenty year old might be
15 in the market for a car. Being in the market for a
16 car they may pay more attention to advertising.

17 Q. Twelve to seventeen year old may want a car,
18 right?

19 A. That's true.

20 Q. In fact, someone who doesn't have a car may want
21 a car and be much more obsessed with cars than
22 someone who doesn't have a car, correct?

23 A. That's true.

24 Q. Teenagers are notorious for obsessing over
25 automobiles, correct?

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1 A. I don't know that I agree with that, but
2 possibly.
3 Q. In part because a car represents independence is
4 one thing, correct?
5 A. It may.
6 Q. Mobility; it's a symbol of adulthood, isn't it?
10:18:00 7 A. For some adolescents I'm sure it is.
8 Q. There are many such symbols of adulthood,
9 correct?
10 A. I suppose, yes.
11 Q. Drinking could be seen as a symbol of adulthood,
12 correct?
13 A. Yes.
14 Q. Cigarettes can be seen as a symbol of adulthood,
15 correct?
16 A. I assume for some.
17 Q. For a lot, right?
18 A. I don't know.
19 Q. Well, the law still is in the State of Minnesota
20 that you're not supposed to smoke before the age of
21 eighteen, so at least to that extent it's a symbol of
22 adulthood, correct?
23 A. To that extent it would be a symbol of
24 adulthood.
25 Q. It may also be a sign of independence, correct,
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1 cigarettes?
2 A. Again, to some adolescents it might be.
3 Q. It could be a sign of rebellion, correct?
4 A. Could be.
5 Q. For some it could be an activity that's
6 perceived as cool?
7 A. Possible, yes.
8 Q. It could be a sign of sophistication, correct?
10:19:00 9 A. Yes.
10 Q. Is it fair to say that in general twelve to
11 seventeen year olds tend to emulate eighteen to
12 twenty year old, kind of their wants and desires?
13 A. I don't know if I could say that in general.
14 Q. Have you ever looked at that issue?
15 A. I don't know those specific age groups.
16 Q. Have you looked at that general notion?
17 A. Yes.
18 Q. And what have you concluded?
19 A. That -- well, at younger ages that there is a
20 tendency to look up to and want to emulate older
21 people.
10:20:00 22 Q. And that continues in through the teen years,
23 correct?
24 A. Some of them, certainly.
25 Q. Does it intensify as the children understand -
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1 or actually not children, but young adults -
2 understand that they're now getting close to
3 adulthood; that is they're approaching the sixteen to
4 seventeen, eighteen year old period and they're going
5 to continue to emulate those who are a little bit
6 older, right?

7 A. Quite possibly.

8 Q. That's what your research has shown, correct?

9 A. Again, my research is with younger people.

10 Q. So your research is with people below the age of
11 twelve?

12 A. Below the age of eighteen.

13 Q. That's what I'm asking. I'm asking whether
14 those people below the age of eighteen, but above the
15 age of twelve tend to want to emulate those in that
16 next group, that eighteen to twenty year old group?

17 A. Certainly some do.

18 Q. A majority?

19 A. I don't know that I could say that. I just
20 don't know.

10:21:00 21 Q. You agree that some portion, maybe the portion
22 of twelve to seventeen year olds emulate the eighteen
23 to twenty year olds, but you can't say specifically
24 what percentage of those people would do so, correct?

25 A. If I could correct that. I know that people in

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1 the twelve and thirteen, fourteen year old age tend
2 to want to emulate older adolescents, fifteen,
3 sixteen, seventeen. I've done no research beyond
4 that point.

5 MR. PURVIS: Could we take a break?

6 MR. O'FALLON: Just let me finish this
7 topic.

8 BY MR. O'FALLON:

9 Q. So you haven't done research into the issue of
10 whether the fifteen to seventeen year olds emulate
11 the eighteen to twenty year olds?

12 A. I have done no research.

13 Q. And you're not familiar with any research on
14 that topic?

15 A. Those specific ages nothing comes to mind at
16 this point.

17 Q. Or those age groups nothing comes to mind?

18 A. The transition from the one to the other, as I
19 sit here nothing off the top of my head.

10:22:00 20 MR. O'FALLON: Why don't we take a
21 break.

22 MR. PURVIS: It's been an hour and
23 thirty-five minutes.
24 (Recess taken.)

10:23:00 25 MR. O'FALLON: While we were off the
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10:25:00 1 record we have changed the exhibit number. The one
2 that was supposed to be on there is 3313, and with
3 your permission we will just change the references in
4 the record.

5 So the record should reflect that we will
6 go back and change what was previously marked as
7 Exhibit 3331 to 3313, and with Counsel's permission
10:37:00 8 we will just make that uniform throughout the
9 deposition.

10 MR. PURVIS: No problem.

11 MR. O'FALLON: I would also like to
12 mark for the record Deposition Exhibit 3314. This is
13 a letter dated September 2nd, 1997 from Julia J.
14 Tyler to Roberta Walburn, and Exhibits 3315 which is
15 a letter dated September 8th, 1997 from Julia J.
16 Tyler to Roberta Walburn, Exhibit 3316 which is a
17 report entitled Advertising Censorship: Factors
18 Accounting for Willingness to Restricting Advertising
19 for Legal Products, and 3317 which is a JAMA article
20 entitled Original Contribution - September 10, 1997,
21 Protecting Adolescents From Harm, Findings From the
22 National Longitudinal Study on Adolescent Health
23 written by Michael Resnick, et al.
24 (Plaintiffs' Deposition Exhibit Nos. 3314 through
25 3317 - documents marked for identification.)

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1 BY MR. O'FALLON:

2 Q. Doctor, if you could just identify that.

3 A. It's a list of materials that were sent to me.

4 Q. Is there a list of additional materials you plan
5 to rely on for your opinions?

6 A. Yes.

7 Q. I'll also hand you a document that's been marked
8 as Plaintiffs' Deposition Exhibit 3315. It's a
9 letter dated September 8 of 1997 from Julia J. Tyler
10 to Roberta Walburn. Could you identify that for the
11 record?

12 A. It's a list of additional materials I plan to
13 rely on.

10:38:00 14 Q. I would also like to hand you a document that's
15 been marked as Plaintiffs' Deposition Exhibit 3316.
16 It's entitled Advertising Censorship: Factors
17 Accounting for Willingness to Restrict Advertising
18 for Legal Products with the authors listed as Ronald
19 J. Faber, Dhavan Shah, et al.

20 Could you please identify that for the record?

21 A. It's a draft of a paper that we're authoring.

22 Q. Is this a document you plan on relying on in any
23 way in your expert opinions in this case?

24 A. Yes.

25 Q. Finally, I'm going to hand you an exhibit that's
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1 been marked Plaintiffs' Deposition Exhibit 3317.
2 This is entitled at the top JAMA, Original
3 Contribution - September 10th, 1997, Protecting
4 Adolescents From Harm, Findings from the National
5 Longitudinal Study on Adolescent Health.
6 It is written by Michael D. Resnick, et al.
7 Could you identify that for the record?
8 A. It's a recent article I plan to rely on as well.
10:39:00 9 Q. It's my understanding that everything you
10 intend to rely on is contained or identified in
11 either Plaintiffs' Deposition Exhibit 3313, 3314,
12 3315, 3316 or 3317, correct?
13 A. All specific material, yes.
14 Q. I'd like to go back and talk for a minute about
15 the work and research you did at the University of
16 Wisconsin.
17 I believe that you said that you first worked --
18 that one of the things you worked on at the
19 University of Wisconsin concerned disclaimers in
20 children, correct?
21 A. Correct.
22 Q. What specifically were you looking at?
23 A. The impact of disclaimer messages.
24 Q. In what context?
25 A. It was in the context of health warnings to
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1 brush their teeth or information to brush their teeth
2 after eating. That was one condition.

3 Q. What were some of the other conditions?

4 A. The other condition was just to not eat as
5 many -- that you shouldn't eat as much sugar, sweets
6 as I recall.

7 Q. What did you find?

8 A. We found numerous things. We found that, for
9 example, older children were better able to
10 spontaneously recall the warning message, although
11 almost all the children had pretty good recall of
12 that.

13 We found I believe that in the warning
14 message -- I'm sorry. Can I rephrase what the two
15 conditions were? I don't think I stated it correctly
16 the first time or two.

17 Q. Sure.

18 A. The first one was a reminder that you should
19 always brush your teeth after eating sugar foods,
20 whatever.

21 The second one was a warning that eating too
22 much sugar food could cause cavities and be bad for
23 your teeth and your health I believe is the way it
24 was phrased. Something along those lines.

25 Q. We were talking about your findings now.

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1 A. The major thing was that the warning condition
2 had a little bit better recall than the just remember
3 to do it condition.

4 And that children by in large report that they
5 learned something from the message so that they were
6 aware of it.

7 I believe and it's been a long time, but I
8 believe we found that -- I can't remember whether
9 there was a difference or not. No, I do remember.

10 There was no difference in groups in terms of
11 how likely they were to engage in the behavior. Both
12 were equally likely.

13 Q. Did you --

14 A. And that that also called with the control
15 condition I believe. It's a little fuzzy.

16 Q. What was the control position?

17 A. Not getting any warning or no disclaimer
18 message.

19 Q. How did you measure that final condition,
20 whether or not it changed their actions?

21 A. Self report measures.

22 Q. So you asked the children whether or not the
23 warnings actually changed their actions?

24 A. We asked them how likely it was that they would
25 do these actions.

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- 1 Q. Did you measure that right after the warning was
2 given?
- 3 A. I believe there was filler error in there. They
4 saw other things, but I don't remember how much was
5 on the stimulus taken.
- 6 Q. Was there any follow up to see whether or not a
7 comparison of how many actually took some action then
8 as opposed to those who just said they were going to?
- 9 A. No, there wasn't.
- 10 Q. So you really didn't follow up to determine
11 whether or not the message was affixing action?
- 12 A. We simply looked at immediate response.
- 13 Q. And you were relying on self reporting as
14 opposed to whether somebody did do an action or
15 didn't do an action, correct?
- 16 A. That is correct.
- 17 Q. What are the ages of those children that you
18 looked at there?
- 19 A. I don't remember exactly.
- 20 Q. Were they younger kids?
- 21 A. Yeah, some were.
- 22 Q. Under the age of twelve?
- 23 A. Yes.
- 24 Q. So you weren't working with teenagers?
- 25 A. I don't remember what the upper age was. It

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1 might have gone up to thirteen or fourteen.

2 Q. Did you also study the placement of the ad and
3 how the ad was portrayed or how the message was
4 portrayed?

5 A. I'm not sure what you mean by how the message
6 was portrayed.

7 Q. Maybe I'm mistaken, but I thought I recall
8 reading something where you had written where there
9 was some action at the end of an advertisement as
10 opposed to just saying something at the end of an
11 advertisement or showing something. Is that wrong?

12 A. I'm not sure what you mean by action, but at the
13 end of the act in this study there was a freeze frame
14 and a voice over.

15 Q. Was there also at one point somebody physically
16 brushing their teeth?

17 A. No, I don't believe so.

18 Q. So there was no comparison of what placement of
19 an ad would be the most effective or placement of a
20 disclaimer would be the most effective?

21 A. The disclaimer message always appeared at the
22 end of the ad.

23 Q. And there was no comparison between different
24 disclaimer ads?

25 A. Yes, there was.

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1 Q. Well, there was between whether you were going
2 to give a reminder or a negative, right, or a don't
3 do this?

4 A. Well, yeah.

5 Q. Was there any difference with how those are
6 conveyed; was there ever any variation in how it was
7 placed?

8 A. I don't recall. I know there was conditions
9 where they were the same. I have a vague
10 recollection there might have been a fourth
11 collection that we did do something, but I don't
12 remember really what it was.

13 Q. You said the other thing that you looked at was
14 factors related to children's understanding and
15 advertising while you were at the University of
16 Wisconsin.

17 A. I'm not quite sure what I said. I'm sorry.

18 Q. Well, have we now discussed the disclaimer work
19 that you did at the University of Wisconsin?

20 A. Yes.

21 Q. You also did some other work involving youth and
22 advertising, correct?

23 A. Yes.

24 Q. What was that work?

25 A. Well, that was a study that looked at the

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1 specific precursors of children's understanding and
2 purpose of television advertising.
3 Q. What specifically did you look at there?
4 A. We tested two models, logical operations versus
5 role taking ability.
6 Q. Why don't you just define those two for me.
7 A. Logical operations is the Piaget stages we
8 talked about before. Role taking ability is the
9 ability to understand the perspective of others.
10 Q. How was this particular study organized?
11 A. I'm sorry. I'm not sure what you mean.
12 Q. How was it conducted; what was your hypothesis?
13 A. Hypothesis was that role taking skill was more
14 directly related to understanding the purpose of
15 advertising than was the logical operation stage.
16 Q. What did you do to test that?
17 A. We measured each of these things with children.
18 Q. How?
19 A. We interviewed them.
20 Q. Did you show them some advertising?
21 A. No.
22 Q. What did you interview them about?
23 A. We asked them questions regarding their
24 understanding of the purpose of advertising, we -- I
25 don't recall how we measured logical operations.

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1 Probably verbal tasks as well. And then we gave them
2 a story and asked them questions about the story to
3 assess role taking.

4 Q. What kind of a story? I guess I'm not
5 understanding how this plays in on advertising so
6 maybe you could educate me on that.

7 A. These are two primary processees, role taking
8 and logical operations, that are independent content
9 area, and we were looking to see their relative
10 importance in this particular context which is
11 understanding advertising.

12 Did you want me to tell you about the role
13 taking things?

14 Q. Yes.

15 A. It was to the best of my recollection - it's
16 been a long time - a story about I believe it was a
17 girl named Holly, and I don't remember the story real
18 well, but it was something along the lines of
19 something happens and it's -- she does something
20 against -- I don't remember if it was against her
21 parent's will or -- she does something and there are
22 different perspectives, parent's perspective,
23 friend's perspective and her perspective, and the
24 question is asked about what she did and why she did
25 them, looked to see how her understanding felt about

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1 it.

2 Q. What did you conclude?

3 A. That role taking operation is more directly
4 related to understanding advertising than was logical
5 operations.

6 Q. Was there some age barrier at which the people
7 were able to more understand this role taking?

8 A. There are stages in role taking, yes.

9 Q. And is that the other thing you were kind of
10 comparing over ages to see when your role taking
11 ability becomes --

12 A. We may have reported that. It wasn't the
13 primary purpose of the study, and I don't recall well
14 enough what age range was.

15 Q. So your basic finding was that role taking has a
16 direct relevance on whether you're able to understand
17 advertising?

18 A. Correct, and that's more directly related than
19 logical operations.

20 Q. And what are those again?

21 A. The Piaget stages.

22 Q. In the context you didn't actually use
23 advertising and ask them to analyze advertising to
24 see if they understood what it meant, did you?

25 A. No specific ads, correct.

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1 Q. You used a story instead?

2 A. No. The advertising measure as best I recall is
3 a direct question asking what is the purpose of
4 advertising.

5 I think there is a series of questions, but it
6 looks basically at their understanding of why
7 advertising exists, what its purpose is.

8 Q. Do you remember what they basically thought the
9 purpose of advertising was?

10 A. In this particular study I don't recall what
11 stages they were predominantly at.

12 Q. You don't recall generally what the various
13 groups perceived --

14 A. I don't remember what age groups we did and I
15 don't remember what the specific finding in terms!
16 of -- again, we weren't looking specifically to find
17 what stage they were in, we were looking
18 comparatively what role taking did to influence the
19 stage they were in. So I don't recall the base
20 findings.

21 Q. Would their ability to understand role taking
22 have a greater effect on their ability to understand
23 image advertising as compared to simply informational
24 advertising?

25 A. We didn't look at that.

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1 Q. What would you hypothesize based on your own
2 experience and knowledge?

3 A. I would say that role taking per se should be
4 independent. Role taking ability should be
5 independent of the ability to understand image
6 advertising.

7 They're different tasks. There may be a
8 correlation, but it wouldn't be due to role taking.

9 Q. Why is that?

10 A. Why would there be a correlation or --

11 Q. Why wouldn't there be a correlation?

12 A. I said there would be a correlation, but it
13 wouldn't be due to role taking.

14 In other words, there are -- sometimes in
15 research we have third variables that are unmeasured
16 that relate to both of the other two variables.

17 So there is an apparent relationship, but it's
18 not one that can be attributed to the secondary.

19 Q. Do you know of any studies that have been done
20 where they assess the ability of this role taking
21 development and any relationship it may have with the
22 ability to comprehend image advertising?

23 A. No, I am not familiar with any such studies.

24 Q. So when you say you think role taking ability is
25 independent of the ability to understand image

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1 advertising what do you base that on?

2 A. Perhaps I misunderstood. I thought you were
3 asking me my opinion of that and so I was basing it
4 on the fact that role taking involves certain
5 abilities that as I sit here and think about it today
6 I don't see relate to those abilities one would need,
7 whatever they may be, for understanding image
8 advertising.

9 Q. What are those abilities you're talking about?

10 A. Which ones?

11 Q. The role taking abilities. You've just said
12 there are certain role taking abilities that would be
13 independent of your ability to understand image
14 advertising, so what is --

15 A. Role taking ability is the ability to understand
16 the perspective of other people. And what I was
17 trying to say is that I didn't see how having that
18 perspective would be helpful in understanding image
19 advertising.

20 Q. How would it be helpful in understanding any
21 advertising?

22 A. Well, it would be helpful in understanding the
23 purpose of advertising because if you understand the
24 perspective of others such as the advertiser, the
25 retailer, et cetera, you might have a better

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1 understanding of why advertising exists.
2 Q. What was the age group you used in this study?
3 A. I'm sorry. I don't recall.
4 Q. Do you have any recollection of the upper limit?
5 A. No, I really don't.
6 Q. Was anything published from that study?
7 A. Yes.
8 Q. Which one of those articles was that?
9 A. Antecedents of Children's Comprehension of the
10 Purpose of Advertising.
11 Q. Was there any other work that you did at the
12 University of Wisconsin concerning advertising or
13 marketing?
14 A. Nothing else that I recall.
15 Q. How about your Ph.D. project?
16 A. It did not involve advertising.
17 Q. It did however involve the ability of children
18 to assess risk, correct?
19 A. Risk, no.
20 Q. Dangers?
21 A. No.
22 Q. Safety?
23 A. No.
24 Q. I'm sorry. I must have misunderstood. What was
25 your Ph.D. paper on?

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- 1 A. It was looking at the role of entertainment,
2 television on a decision to go to college.
3 Q. What did you conclude?
4 A. That where people are in a decision influences
5 what they perceive from the message.
6 Q. Meaning what?
7 A. There is a difference -- well, there is not a
8 simple way to describe it. Depending on what stage
9 they're in or basically how much knowledge they had
10 gathered and how certain they were of their decision
11 influenced how they responded to programming content
12 that dealt with a similar kind of decision.
13 Q. What specific -- how did you conduct that study?
14 A. We measured stage of decision and then went back
15 a couple weeks later and showed a television program
16 and then asked questions afterwards.
17 Q. What did the television program involve?
18 A. It was an episode of One Day at a Time.
19 Q. What was the general theme of the television
20 show?
21 A. It was a story about the elder daughter's
22 decision of whether or not to go to college.
23 Q. And her decision ultimately was what?
24 A. Left suspended. She didn't finally resolve it.
25 Q. And people perceive that episode differently

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1 depending on how they -- where they themselves were
2 in the decision on whether or not to go to college or
3 not, correct?

4 A. They perceived different statements made in the
5 program differently, yes.

6 Q. Were any of the statements made in the program
7 able to move them one way or the other or were you
8 testing them?

9 A. No, we were not.

10 Q. So you weren't doing any kind of a study to see
11 whether or not the programming somehow affected their
12 decision in a before and after sense?

13 A. That's correct.

14 Q. You were only testing how they perceived a
15 specific message at the time?

16 A. Yes.

17 Q. Have you ever done any research where you
18 evaluated whether or not advertising or any media
19 input affects a person's decision from point A to
20 point B?

21 A. Broadly, yes.

22 Q. Which would those -- which articles reflect
23 those studies?

24 A. Some of these articles on political advertising.

25 Q. And do you find that political advertising can
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1 affect movements from point A to point B?
2 MR. PURVIS: Object to the form.
3 THE WITNESS: It depends on factors.
4 BY MR. O'FALLON:
5 Q. I would understand that, but generally is that
6 what you found?
7 A. Generally, no.
8 Q. So political advertising doesn't have any
9 impact?
10 A. No, that's not true.
11 Q. Political advertising does have an impact?
12 A. Correct.
13 Q. Have you ever looked at whether political
14 advertising has an effect on not only who someone
15 votes for, but whether they vote at all?
16 A. I have not looked at that, no.
17 Q. That would be an example of primary versus
18 secondary demand, correct?
19 A. It could be perceived that way.
20 Q. Even though that would be a relatively mature
21 type of a market, we all pretty much understand the
22 ability to vote, correct?
23 A. We may have the ability to --
24 Q. We don't always exercise it?
25 A. Yes.

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1 Q. So the fact that we all know about something and
2 all have the ability to do it doesn't mean we do it,
3 correct?

4 A. Correct.

5 Q. You understand that a lot of campaigns,
6 political campaigns, run ads that say not only, for
7 instance, vote for Bill Clinton, but just vote,
8 correct?

9 A. Correct.

10 Q. Because they understand that whether they win or
11 not is really a function of two things; it's a
12 function of how many people vote for them and also
13 how many people vote in general, correct?

14 A. I assume that they recognize that.

15 Q. And that's really the same dilemma that any
16 manufacturer of a product faces, correct? Not a
17 dilemma, just what they face, correct?

18 A. Some products.

19 Q. Well, going back to our example of computers,
20 our first thing is we have to get them to buy the
21 computer itself, second thing is we have to get them
22 to want to buy ours, right?

23 A. As I say, there are other factors that affect
24 whether they want to buy them or not. The primary
25 goal of most is to try to get them to buy yours.

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- 1 Q. It's certainly not the sole though, is it?
- 2 A. I can't say whether it is or isn't. I'm sure
- 3 there has been some situations where they had a goal
- 4 where they wanted to try and do something other than
- 5 brand preference.
- 6 Q. Isn't it kind of a necessary corollary; for
- 7 instance, isn't it just necessary that in the process
- 8 of advertising, how great Dell computers are, you're
- 9 in a large part selling the advantages of computers
- 10 generically?
- 11 A. Not necessarily.
- 12 Q. That can certainly be one off shoot, correct?
- 13 A. Some people could potentially look at that ad
- 14 and see if that computer offers these values, these
- 15 attributes.
- 16 Q. Especially to the - quote - unquote -
- 17 uninitiated, correct?
- 18 A. What do you mean by uninitiated?
- 19 Q. Well, if I don't have a computer, but some point
- 20 might want a computer, the fact that an advertisement
- 21 for Dell talks about nothing but sixteen built RAM
- 22 doesn't do me a whole lot of good, does it, if I
- 23 don't know anything about computers?
- 24 A. Possibly not necessarily.
- 25 Q. It would probably be better for Dell at least in
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- 1 part to tell me that a computer somehow is going to
2 make my life better, correct?
3 A. Not necessarily.
4 Q. Wouldn't you agree that in general advertising
5 is all about attempting to increase the perceived
6 value that each of us places on products?
7 A. I would say that predominantly advertising's
8 increasing or reinforcing the value itself, the value
9 each of us places on brands.
10 Q. Going back to your whole notion that again
11 advertising is simply brand specific, correct?
12 A. Most advertising is brand specific, yes.
13 Q. But not all advertising is brand specific,
14 right?
15 A. No, not all.
16 Q. Would you give me some examples of advertising
17 that's not brand specific?
18 A. The Sunkist orange growers.
19 Q. Don't they want you to buy Sunkist products?
20 A. Yes.
21 Q. But what they want you to do mostly is buy
22 orange juice?
23 A. Well, they're a group of growers all independent
24 from each other.
25 Q. But the first thing they want you to do is buy
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1 orange juice, right?
2 A. Yes, that's true.
3 Q. Even though they're asking you and advertising
4 about Sunkist oranges or orange juice, the first
5 thing they want you to do is to buy oranges or orange
6 juice, right?
7 A. In that particular case I believe that is their
8 goal.
9 Q. What are some other examples?
10 A. Milk.
11 Q. What else?
12 A. I think there was other agricultural products.
13 Q. What else?
14 A. Those are the ones that come to mind.
15 Q. Is there any other research that you did at the
16 University of Wisconsin other than what we have
17 discussed --
18 A. I'm sure there is.
19 Q. -- involving advertising --
20 A. No.
21 Q. -- or marketing?
22 A. Not to the best of my recollection.
23 Q. After you graduated from the University of
24 Wisconsin you accepted your position at the
25 University of Texas, correct?

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- 1 A. That's correct.
- 2 Q. Have you been primarily involved in academia
- 3 since 1980?
- 4 A. Yes.
- 5 Q. Under professional experience you say that you
- 6 are a consultant to a number of national and local
- 7 companies, advertising agencies, law firms and state
- 8 organizations, correct?
- 9 A. That I have done, yes.
- 10 Q. What national and local companies have you
- 11 consulted with?
- 12 A. Hilton Hotels, the Weinberg Group, Gene Riley
- 13 Group. Those are the ones that come to mind.
- 14 Q. The Weinberg Group, what are they?
- 15 A. I believe it's a consulting firm.
- 16 Q. They do advertising?
- 17 A. No, not to the best of my knowledge.
- 18 Q. What kind of consulting do they do?
- 19 A. I believe they do information for companies
- 20 about products, about a range of things. I'm not
- 21 really sure exactly all the things they do.
- 22 Q. What did you do for the Weinberg Group?
- 23 A. I provided some information regarding children
- 24 in advertising, adolescents in advertising.
- 25 Q. Do you know to what purpose they put that
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1 information?
2 A. It was predominantly in regard to advertising
3 for beer, and I believe it was for their client they
4 were looking for. What they did with it, I don't
5 know.
6 Q. Who was their client?
7 A. Anheiser Busch.
8 Q. Did you ever meet the client?
9 A. I'm not sure what you mean by the client.
10 Q. Did you ever meet anybody from Anheiser Busch?
11 A. Yes.
12 Q. Do you know what their purposes were for
13 attaining the information you have?
14 A. No, I don't.
15 Q. Did you ask them whether or not they intended to
16 advertise to children?
17 A. I gathered they did not, but I never asked them,
18 no.
19 Q. Would you be concerned at all about that,
20 somebody using your information to advertise a
21 product to children when it's illegal for the
22 children to have that product?
23 A. The nature of the information I provided to them
24 I don't think it would have been used for that
25 purpose.

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1 Q. Did you ever ask whether it was going to be used
2 for that purpose?

3 A. I never specifically asked.

4 Q. Isn't that something you would want to know
5 before you entered into a consulting relationship?

6 A. Not necessarily.

7 Q. So it wouldn't bother you if Anheiser Busch took
8 the information you provided and used it to design a
9 campaign intended to reach children?

10 MR. PURVIS: Object to the form.

11 THE WITNESS: As I indicated, the
12 information I provided to them I don't believe could
13 be used for that purpose.

14 Q. What specifically did they ask you for?

15 A. About some of the literature that regarded
16 advertising and beer and alcohol.

17 Q. What year was that?

18 A. I've done a few -- similar kinds of information
19 I'd say the last couple of years.

20 Q. You've done similar types of information for
21 Anheiser Busch?

22 A. Well, no, for the Weinberg Group.

23 Q. And then it gets funneled down to the Anheiser
24 Busch group?

25 A. I don't know what happens to it. I assume, but
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1 I don't know.
2 Q. So basically the Weinberg Group is your go
3 between Corporate America and this information about
4 kids?
5 A. They're the people I provide the information to.
6 Q. And you don't know when you provide it where
7 they're going to give it?
8 A. I don't know what they're going to do with it,
9 no.
10 Q. You know Anheiser Busch got some of your
11 information concerning advertising and children. Did
12 anybody else get some of that information?
13 A. I don't know.
14 Q. So you don't really know what the Weinberg Group
15 does with the information you provide them?
16 A. That's correct.
17 Q. You do know that they've given the information
18 to Anheiser Busch, but you don't know if they've
19 given the information to anybody else?
20 A. That's correct. And I don't know for a fact
21 that they've given it to Anheiser Busch.
22 Q. How long did you meet with the people for
23 Anheiser Busch?
24 A. About an hour to the best of my recollection.
25 Q. What did they want with you? Who did you meet
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- 1 with, someone from their advertising department?
- 2 A. No.
- 3 Q. Who did you meet with?
- 4 A. Some lawyers.
- 5 Q. What lawyers?
- 6 A. I don't recall their names.
- 7 Q. Do you recall what law firm they were with?
- 8 A. No, I don't.
- 9 Q. Were they local?
- 10 A. Rightly or wrongly, I assumed they were
- 11 in-house, but I have no idea at this point.
- 12 Q. And they didn't give you any indication of what
- 13 they intended to do with the information you were
- 14 providing?
- 15 A. My understanding was that they were just
- 16 concerned about the issues and wanted to know what
- 17 literature was currently saying.
- 18 Q. What did you tell them?
- 19 A. I told them what existed in the literature.
- 20 Q. Specifically what did you tell them?
- 21 A. I don't recall.
- 22 Q. Did you tell them that beer advertising was
- 23 having an impact on children?
- 24 A. I don't believe I would have said that, no.
- 25 Q. Well, then what would you have said?

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1 MR. PURVIS: Objection.

2 THE WITNESS: At this point as we sit
3 here I don't recall what I said.

4 BY MR. O'FALLON:

5 Q. Do you recall generically what the theme was
6 that you were trying to convey to these gentlemen?

7 A. I think I looked at what existed in some of the
8 literature and I told them about some studies that
9 were going on and what were being found.

10 Q. What was being found; what were you telling them
11 was being found?

12 A. As I say, I don't recall the specifics.

13 Q. Give me what you have; you must have some
14 recollection.

15 A. I recall -- I think we talked a little bit about
16 general factors involved in risk taking.

17 Q. What did you tell them?

18 A. Just about literature and adolescent risk
19 taking, they tend to -- that some adolescents are
20 risk takers.

21 I think we talked -- again, I don't remember if
22 I've talked to them or if this was something that
23 came up later, but I remember some literature that
24 looked at the impact of parents on moderateing
25 alcohol consumption of adolescents or - excuse me -

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1 college students.

2 Q. Did parents have any impact on moderateing
3 college student's alcohol behavior?

4 A. Yes. Not necessarily directly, although some
5 degree of that was true. But certainly based on
6 things like their family communication patterns.

7 Q. What else did you tell them?

8 A. I don't recall. I mean we just talked about
9 general issues in children, children in advertising.

10 I'm sure we covered the same things here that I
11 might have hold told them, but I honestly don't
12 recall.

13 Q. Other than Anheiser Busch have you met any other
14 clients of the Weinberg Group that received any of
15 your information?

16 A. No.

17 Q. Do you know of any other clients of the Weinberg
18 Group who have received your information?

19 A. No.

20 Q. What's the Gene Riley group?

21 A. It was - I don't know if it's still in
22 existence - a consulting company.

23 Q. What did the Gene Riley group consult about?

24 A. They produced a number of reports regarding
25 general information about advertising and children.

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- 1 Q. Where were their reports sent or used?
2 A. I believe they had companies that purchased
3 them, but I'm not positive.
4 Q. So this was a research group that did research
5 on youth for companies?
6 A. It did research on youth and I believe sold the
7 reports to companies. I don't know that they did the
8 research directly from the companies.
9 Q. So they sold research on youth to companies,
10 correct?
11 A. I believe that's correct.
12 Q. Do you know what kind of research on youth they
13 did?
14 A. Not all of it, no.
15 Q. What do you know about?
16 A. I know what I worked on.
17 Q. What did you work on?
18 A. A four volume report that dealt with a lot of
19 different elements of children, families and
20 advertising understanding.
21 Q. Was that report then sold to various companies?
22 A. I don't know. I assume, but I have no direct
23 knowledge of that, how it was distributed.
24 Q. Do you know who funded that research while it
25 was ongoing?

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1 A. I don't know how that was done.
2 Q. Did you have any understanding as to whether
3 various companies funded that research?
4 A. I don't know whether they provided funds
5 beforehand or not. I have no idea.
6 Q. Do you know any of the companies that Gene Riley
7 did work for or consulted with or sold your report
8 to, whatever?
9 A. I'm not sure.
10 Q. Do you know any of them?
11 A. I have a vague recollection and I'm not sure if
12 it's correct or not.
13 Q. What's your vague recollection?
14 A. Morris.
15 Q. Philip Morris?
16 A. No, Mars. M&M's, Mars Candy.
17 Q. Anybody else?
18 A. Nobody else that I recall.
19 Q. Do you know whether the cigarette industry has
20 ever been a client of the Weinberg Group?
21 A. I don't know.
22 Q. Do you know whether the cigarette industry has
23 been a client of the Gene Riley group?
24 A. I don't know.
25 Q. Does that cover -- I think we talked about
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1 national and local companies. How about advertising
2 agencies?

3 A. When I was in Texas I did a little bit of work
4 for a couple local agencies.

5 Q. Which agencies were those?

6 A. I don't even remember the name.

7 Q. What kind of work did you do?

8 A. Helped in designing research for them.

9 Q. What kind of research were you designing?

10 A. Consumer survey.

11 Q. Anything else?

12 A. No. It was mostly just designing research a
13 little bit, just talking about general issues I'm
14 sure came up, but --

15 Q. What was the purpose of their consumer surveys?
16 Were they trying to figure out the effectiveness of
17 the advertising campaigns they had designed?

18 A. No. Well, in one case there may have been some
19 evaluation done.

20 Q. How about the in others?

21 A. Predominantly it was to gather primary or basic
22 research to build the campaign on rather than
23 evaluate it.

24 Q. When you do that, when you're trying to figure
25 out how you're going to build your campaign, what

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1 kind of information would an advertiser or marketer
2 want?
3 A. It varies greatly. It depends on the situation.
4 Q. How about just generically, what kinds of
5 information would you want?
6 A. You might want information on media habits,
7 brand preference, usage. There is many things, but
8 those are some of the more prominent ones.
9 Q. Product perception?
10 A. Certainly.
11 Q. Product image?
12 A. Possibly.
13 Q. Again, those are all things that an advertiser
14 would use in an attempt to manipulate in order to
15 sell whatever product they were going to try sell,
16 correct?
17 A. Not necessarily, but they are things that in
18 some cases could be used.
19 Q. And manipulated, right?
20 A. I -- depends what you mean by manipulated.
21 Q. How do you define manipulated?
22 A. Well, we could just simply say as we would in
23 research; if we manipulate something, we just simply
24 vary it, change it.
25 Q. That's one of the purposes of advertising,
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- 1 right, to change or vary product perceptions?
2 A. Sometimes, yeah. Brand perceptions.
3 Q. Hopefully to vary or influence product choice
4 right?
5 A. Brand choice, yeah.
6 Q. Never product choice?
7 A. I couldn't say never, but generally. If you're
8 talking generically what do we normally do, it's
9 generally we brand choice.
10 Q. And again, that's based upon what? I'm sorry.
11 I keep misunderstanding what type of research you've
12 done to come to that conclusion.
13 A. It's based on most of the literature in the
14 field.
15 Q. Have you ever looked at an entire advertising
16 campaign for any product over one month and said this
17 is only -- concluded this is only brand advertising,
18 this is never in any way designed to get people to
19 just use this product generically; have you ever done
20 that?
21 A. No.
22 Q. So you've never done that kind of research,
23 right?
24 A. Correct.
25 Q. And what articles that you have in any of the
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1 information that we have looked at supports your
2 notion that the vast majority of advertising is brand
3 advertising and not primary advertising?

4 A. I couldn't say for certain, but I could point
5 you to certain ones that are quite likely to indicate
6 it or say it. But to be certain, I would really need
7 to look at them.

8 Q. Well, you've got Exhibit 3313 in front of you,
9 right?

10 A. That's correct.

11 Q. Why don't you just read off the first name of
12 the author the articles that you think -- that you
13 claim support your testimony that the vast majority
14 of advertising is brand advertising, and then if you
15 would just use this pen and mark a little X by those
16 as you read them off?

17 A. Again, as I say, I would have to look to be
18 sure, but these are ones that very well might
19 indicate that.

20 Assael, Belch & Belch, Peter and Olson,
21 possibly Robertson.

22 Q. Why don't you put a mark by that.

23 A. Rothschild, Russell and Lane, Schultz and
24 Barnes, Shiffman and Kanuk. I think that would be --
25 excuse me. Wells, Burnett and Moriarty.

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1 Q. What other work did you do with advertising
2 agencies?

3 A. I'm not sure what you mean by work.

4 Q. I'm referring to where you say you've done
5 consultancy --

6 A. Okay.

7 Q. Have you done work other than that; have you
8 done work for advertising agencies other than
9 consultancy relationships?

10 A. No.

11 Q. So consultancy relationships would be the only
12 thing you've had with an advertising agency, correct?

13 A. Other than talking with people and --

14 Q. I'm talking about paid.

15 A. Paid, that's correct.

16 Q. Have you consulted with any other advertising
17 agencies other than the ones in Texas? It's my
18 recollection you don't remember the names of those
19 advertising agencies.

20 A. That's correct.

21 Q. Over what period of time did you do this
22 consulting work with these advertising agencies in
23 Texas?

24 A. It would cross a period of a couple years. I
25 don't really recall. They were individual projects,

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1 so --

2 Q. Approximately how many individual projects did
3 you work on?

4 A. Probably three or four.

5 MR. O'FALLON: Why don't we take a break.

6 (Recess taken.)

7 BY MR. O'FALLON:

8 Q. When we left off you were talking about the work
9 you had done for ad agencies. You said you had
10 worked on three or four individual products, correct?

11 A. That's correct, I think.

12 Q. Do you recall any of the products involved?

13 A. I believe one was for an automobile dealer.

14 Q. Anything else?

15 A. A couple of the others were for seat belt
16 campaigns.

17 Q. Anything else?

18 A. No. That's what I recall.

19 Q. And have you ever done any consulting with any
20 of the ad agencies here in Minnesota?

21 A. No.

22 Q. I believe have we know talked about all the
23 consulting or advertising work you've done with other
24 agencies?

25 A. Well, depends on what you mean by other work. I
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1 believe so.

2 Q. I'm not trying to leave this open so what do you
3 mean by other work?

4 A. Well, I've certainly talked to people in
5 advertising agencies. I've done unpaid things where
6 I've given them advice, I've had professional
7 conversations.

8 Q. What ad agencies have you done unpaid work for?

9 A. I've talked to people in -- who I knew in
10 agencies and given them opinions about specific
11 things that came up if that's what you're referring
12 to.

13 Q. Well, I guess what I'm referring to is something
14 on a more formal basis?

15 A. Nothing on a formal basis.

16 Q. Have we now discussed all the paid work you've
17 done on behalf the of ad agencies?

18 A. Correct.

19 Q. And you've done no paid work on behalf of
20 Minnesota ad agencies, correct?

21 A. Correct.

22 Q. You've also been a consultant to law firms.
23 Which law firms?

24 A. Shook, Hardy & Bacon.

25 Q. When did that relationship first start?

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- 1 A. I'm not sure exactly.
2 Q. Give me your best guess.
3 A. My best guess is sometime in the second half of
4 1994.
5 Q. What was the nature of your relationship with
6 Shook, Hardy; what were you doing for them?
7 A. Talked to them about information regarding
8 advertising and smoking.
9 Q. Did they approach you or did you approach them?
10 A. I believe they approached me.
11 Q. Do you know how they heard about you?
12 A. I assume from colleagues.
13 Q. Did they say specifically how they heard of you?
14 A. They had mentioned that they had spoken to or
15 heard about me from colleagues.
16 Q. What -- you mean their colleagues, other
17 lawyers?
18 A. No, mine.
19 Q. Do you know what colleagues?
20 A. Tom O'Guinn.
21 Q. Had Tom O'Guinn done consulting work with the
22 cigarette industry previously?
23 A. I don't know.
24 Q. Was 1994 your first exposure to working with the
25 cigarette industry?

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1 A. I didn't work with the cigarette industry, I
2 worked with Shook, Hardy.
3 Q. Do you know who was paying Shook, Hardy?
4 A. I have an assumption.
5 Q. The cigarette industry, right?
6 A. I would assume.
7 Q. Did you attempt to clarify that when you were
8 approached by them? Did you ask them who their
9 clients were that you were doing work on behalf of
10 when they approached you?
11 A. I don't recall directly asking that question.
12 Q. Isn't that something you would want to know?
13 A. As I said, I assumed it and didn't ask directly.
14 Q. How did you assume it was the cigarette
15 industry?
16 A. Given the nature of the questions we were
17 talking about.
18 Q. What were the questions you were talking about?
19 A. I don't know. Is this something that is
20 privileged or not?
21 Q. You don't raise that objection.
22 MR. PURVIS: You can describe it
23 generally, but not specifically.
24 THE WITNESS: I apologize. I don't
25 know the procedures here. Generally -- I'm sorry.
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1 Could you ask the question again?

2 MR. O'FALLON: I'll have you read it.

3 (Record read.)

4 THE WITNESS: As I say, we were
5 talking about advertising, impact of consumer
6 behavior and variables and factors in consumer
7 behavior.

8 BY MR. O'FALLON:

9 Q. Did they ask you to do any research?

10 A. To look at literature.

11 Q. Did they ask you to do any hands-on research?

12 A. Could you tell me what you mean by hands-on
13 research?

14 Q. Well, I think you described research before as
15 forming a hypothesis and then testing a hypothesis.
16 Did they ask you to do that?

17 A. Not formally.

18 Q. Did they ask you to do it informally?

19 A. I suppose you could say yes.

20 Q. Was it your hypothesis or their hypothesis?

21 A. It was a research question and I looked at the
22 research question. It wasn't really a hypothesis.
23 It was an open ended question.

24 Q. Who posed the question, them or you?

25 A. I believe it was something that I talked about

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1 and said I could look at something, so I think it
2 was.

3 Q. What was the research question that the tobacco
4 industry wanted you --

5 MR. PURVIS: Mr. Faber, I think at
6 this point you've gone into the conversation
7 sufficiently that we're now to the point where we're
8 talking about materials that are protected by the
9 work product, and I would ask Dr. Faber to --

10 BY MR. O'FALLON:

11 Q. What was the general research you were going to
12 undertake, the research question you were going to
13 undertake to look at?

14 A. The similarity or difference of cigarette ads to
15 other consumer product advertising.

16 Q. Why did they want to look at that?

17 MR. PURVIS: Object to the form of the
18 question.

19 THE WITNESS: I don't really know why
20 they wanted to look at that.

21 BY MR. O'FALLON:

22 Q. Why did you want to look at it?

23 A. I thought it would be worth looking at to see to
24 the degree that those ads were similar or different.

25 Q. How long did that research project last?

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- 1 A. I don't recall.
2 Q. Can you give me an estimation?
3 A. It was kind of an ongoing thing. It wasn't like
4 a starting point and ending point. I just kind of
5 looked.
6 I think it was probably -- I don't know. I
7 would be guessing. I really don't know.
8 Q. Is it ongoing today?
9 A. We never really formally talked about it.
10 Q. What did you do to research that question?
11 A. Basically examined ads, looked at them, looked
12 for ads that were similar or different.
13 Q. Did you collect those ads?
14 A. Some.
15 Q. Where are those ads at?
16 A. I don't know.
17 Q. Do you still have them?
18 A. Not the ads themselves, no.
19 Q. Do you have notes about those ads?
20 A. I have transparencies that show those ads.
21 Q. What did you do with the ads themselves?
22 A. I don't recall.
23 Q. How many ads did you collect?
24 A. I don't remember.
25 Q. More than a hundred?

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- 1 A. No.
2 Q. Excuse me?
3 A. No.
4 Q. More than ten?
5 A. I don't recall.
6 Q. But you got the transparencies somewhere in your
7 files?
8 A. Yes.
9 Q. Are they part of what we have got here?
10 A. Yes.
11 Q. And the document that's attached to this, is
12 this the result of your research? I think it's
13 entitled Minnesota A-G Presentation. Is this the
14 result of your research?
15 A. Yes.
16 Q. When did you finalize this document?
17 A. I believe -- I believe it was sometime this
18 summer. I'm not quite sure. It might have been a
19 little before that.
20 Q. This appears to be a presentation. Have you
21 ever given this presentation to anybody?
22 A. It was basically served as points for
23 discussion, but --
24 Q. Served as points for discussion with whom?
25 A. Lawyers.

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- 1 Q. Have you ever given this as a formal
2 presentation to a group of lawyers?
3 A. I don't know what you mean by formal
4 presentation.
5 Q. Have you ever presented this paper to lawyers?
6 A. I've talked about issues in this with the
7 lawyers, yeah.
8 Q. Well, you said that your ads are on
9 transparencies so I have to assume that some of what
10 is attached here is transparencies.
11 A. Correct.
12 Q. Have you ever been in a meeting where you showed
13 those transparencies?
14 A. Yes.
15 Q. Are these a group of these transparencies?
16 A. They first point out what I wanted to talk about
17 and cover.
18 Q. Where did you show these transparencies?
19 A. I showed them in a law firm. It might have been
20 this one. I'm not sure. Somewhere in Minneapolis.
21 Q. Who did you show them to?
22 A. As I say a group of lawyers. I'm not sure who
23 all of them were.
24 Q. When did you make this presentation?
25 A. I don't recall the date.

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- 1 Q. Well, why don't you give me your best
2 approximation.
3 A. As I said, sometime around the summer of I
4 believe this year.
5 Q. Did you make the presentation prior to having
6 this report served on the plaintiffs in this case?
7 A. I don't know when that was.
8 Q. Do you recall when you signed your report?
9 A. My report? I'm sorry.
10 Q. Well, I understand this was served with your
11 report.
12 A. I misunderstood. Yes, it was made prior to the
13 report.
14 Q. Do you remember when you signed your report?
15 A. Not off the top of my head, no.
16 Q. Have you done any other research for Shook,
17 Hardy & Bacon other than this research concerning
18 analyzing the similarities or differences of
19 cigarette ads to other consumer products?
20 A. As I said, I've looked at the literature and
21 considered that.
22 Q. You've looked at the literature as part of this
23 process of finding similarities or differences or
24 you've looked at the literature for other purposes?
25 A. Yes, for other purposes.

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1 Q. So what purposes have you looked at the
2 literature for?

3 A. To get a better understanding of the factors
4 that play a role in cigarette initiation and related
5 issues there.

6 Q. Anything else?

7 A. I'm sorry. I'm not sure what you mean.

8 Q. Have you done any other research, looked at any
9 other questions on behalf of Shook, Hardy & Bacon?

10 A. Yes. I can think of one other question.

11 Q. What's the other question you've looked at?

12 A. Well --

13 MR. PURVIS: Could I confer with him
14 for a second?

15 MR. O'FALLON: I don't think so.

16 MR. PURVIS: To the extent that you
17 may have done consulting for other members of my
18 firm, I don't think it's appropriate for you to
19 reveal that.

20 If it's not related to the tobacco
21 litigation, I would instruct you not to discuss it if
22 that is the case.

23 THE WITNESS: That's the case.

24 BY MR. O'FALLON:

25 Q. Without identifying the client could you just
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1 tell me generically what the other product it was
2 that you looked at?

3 MR. PURVIS: I am going to ask you not
4 to answer that question. I believe it goes into
5 matters that would be privileged in other litigation.

6 BY MR. O'FALLON:

7 Q. Have you been disclosed as an expert in this
8 other litigation?

9 A. No.

10 Q. I take it this other litigation not cigarette
11 litigation, correct?

12 A. Correct.

13 Q. Concerning cigarettes, have you ever been asked
14 to look at any other research issues?

15 A. Other than ones that I would consider to be
16 part of looking at general consumer behavior issues.

17 Q. Such as?

18 A. As I say, factors that influence initiation;
19 they're pretty much the things that are listed here.
20 Looking at general communications, models, factors
21 that affect people in consumer decisions.

22 Q. Approximately -- prior to 1994 when you were
23 approached by Shook, Hardy & Bacon have you ever done
24 any work concerning cigarettes?

25 A. Not to the best of my recollection.

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1 Q. And prior to 1994 you've never done any work
2 either directly or indirectly for the cigarette
3 manufacturers?

4 A. Correct. To the best of my knowledge.

5 Q. And you specifically hadn't done any research
6 into cigarettes or cigarette advertising prior to
7 being approached by Shook, Hardy & Bacon in 1994,
8 correct?

9 A. Correct.

10 Q. As you sit here today you haven't actually done
11 bench type research in the sense of forming a
12 hypothesis and testing that hypothesis with, for
13 instance, a live controlled group, correct?

14 A. I'm sorry. Could you repeat the question?

15 Q. Sure. As you sit here today you haven't done
16 any research as you defined it previously; that is
17 where you form a hypothesis and test that hypothesis
18 in a scientific manner on behalf of Shook, Hardy &
19 Bacon, correct?

20 A. That's correct.

21 Q. What you've done basically is literature,
22 correct?

23 A. Correct.

24 Q. Have you worked for any other law firms other
25 than Shook, Hardy & Bacon?

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1 A. Yes.
2 Q. What other law firms are those?
3 A. For Jones, Day.
4 Q. When were you first approached by Jones, Day --
5 A. I don't recall.
6 Q. -- give or take?
7 A. Somewhat of a guess, but I would say probably
8 around '92.
9 Q. 1992?
10 A. Yes.
11 Q. Do you recall who approached you?
12 A. I believe it was Barbara Caser (phonetic).
13 Q. What work did you do for them?
14 A. Reviewed a couple articles.
15 Q. What articles did you review?
16 A. Articles from JAMA.
17 Q. What articles?
18 A. I don't recall the titles per se.
19 Q. Are those the DiFranze articles?
20 A. Yes. That was one of them.
21 Q. And the DiFranze articles involve the issue of
22 the Camel campaign and youth, correct?
23 A. Correct.
24 Q. What specifically did you do on behalf of Jones,
25 Day?

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1 A. Read the articles and gave my opinions.
2 Q. Did you give those in a written form?
3 A. No.
4 Q. What were your opinions?
5 A. That there were problems with the research.
6 Q. What were the specific problems you outlined for
7 Jones, Day?
8 A. I don't recall all of them.
9 Q. Could you give me to the best of your knowledge
10 what you recall?
11 A. If I could see the articles, but certainly there
12 was a problem in some of the assumptions made in
13 them, the conclusions.
14 I believe there was some potential problems with
15 design as well, but I don't recall specifically what
16 that was at this point.
17 Q. Did Jones, Day -- you understood that you were
18 reviewing those articles on behalf of Jones, Day's
19 client, R.J. Reynolds, correct?
20 A. I believe I did.
21 Q. So prior to 1994 you had done work for the
22 cigarette industry, correct?
23 MR. PURVIS: Object to the form of the
24 question.
25 THE WITNESS: No.
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1 BY MR. O'FALLON:

2 Q. You're going to testify as you sit here today
3 that even though you knew -- Jones, Day paid you,
4 correct?

5 A. Correct.

6 Q. Did you have any understanding as to whether
7 Jones, Day was billing their client for the money
8 they paid you?

9 A. I have no direct knowledge, but --

10 Q. Any doubt in your mind that your check was
11 ultimately being paid by R.J. Reynolds Tobacco
12 Company?

13 A. I assume Jones, Day was being reimbursed for
14 their expenditures.

15 Q. Any doubt in your mind that that was true?

16 A. Probably some, but not --

17 Q. So you did know prior to 1994 you had done work
18 for the tobacco industry, right?

19 MR. PURVIS: Object to the form of the
20 question.

21 THE WITNESS: I perceive it as having
22 done work for Jones, Day.

23 BY MR. O'FALLON:

24 Q. You understood who was ultimately paying for the
25 work that you were doing, right?

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1 A. Yes.

2 Q. And you understood that was the tobacco
3 industry?

4 MR. PURVIS: Object to the form of the
5 question.

6 THE WITNESS: I understood that
7 Jones, Day was working for the tobacco industry, yes.
8 BY MR. O'FALLON:

9 Q. And you understood they weren't doing that
10 gratis, correct?

11 A. Correct. I assume, but I don't know for sure.

12 Q. Is there any other work that you've done; any
13 other work that we have not talked about? Is there
14 anything else?

15 A. I don't know.

16 Q. Well, is there any other work that you've done
17 in your career that you have reason to believe was
18 ultimately paid for by one of the cigarette
19 manufacturers?

20 A. When you say ultimately paid by -- I'm not sure.

21 Q. Look, when you're paid by Jones, Day you
22 understand Jones, Day and the partners at Jones, Day
23 aren't cutting you a check without some expectation
24 that they're going to be reimbursed by their client,
25 R.J. Reynolds Tobacco.

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- 1 So is there any other work that you have reason
2 to believe was ultimately paid for by a cigarette
3 manufacturer?
4 A. Yes.
5 Q. What work was that?
6 A. I've done some work for a consulting company
7 that --
8 Q. What consulting company was that?
9 A. Tree House.
10 Q. What is Tree House?
11 A. It's a consulting company.
12 Q. I kind of figured that one out on my own. What
13 do they do?
14 A. I don't know everything they did. They produced
15 information for clients.
16 Q. What kind of information?
17 A. Articles, some literature reviews.
18 Q. Are they an advertising agency?
19 A. No.
20 Q. Are they a consulting agency?
21 A. I believe so.
22 Q. Do they work in the area of marketing?
23 A. Yes.
24 Q. Do they work in the area of communications?
25 A. Yes.

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1 Q. Where are they located?
2 A. Illinois.
3 Q. How come you didn't tell me about these when I
4 asked you about all the national and local
5 companies?
6 We're now down to law firms, only state and
7 organizations left. How come that didn't come up
8 when I asked about it?
9 A. I'm sorry. I didn't think about it then.
10 Q. What did you do for Tree House?
11 A. I've reviewed some literature for them.
12 Q. When were you first asked to review that
13 literature?
14 A. I don't recall.
15 Q. Give me an approximate time.
16 A. Around '92 I would believe.
17 Q. What literature did you review for them?
18 A. I don't recall. I've reviewed a bunch of
19 articles.
20 Q. What was the general topic of the articles?
21 A. Cigarettes, advertising.
22 Q. Can you get a little more specific than that?
23 A. I believe I also reviewed the DiFranze articles,
24 reviewed -- I believe I reviewed a couple articles on
25 risk taking, some stuff on children and advertising.
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- 1 Q. Do you know why you were asked to review that
2 literature?
3 A. I'm not sure what you mean.
4 Q. What did Tree House say to you? Did Tree House
5 approach you or did you approach Tree House?
6 A. I believe they approached me, but I don't
7 recall.
8 Q. What did they say when they approached you?
9 A. That they were looking for some reviews or they
10 needed some work done.
11 Q. Concerning what?
12 A. I don't recall the specific terms, but I'm sure
13 it was in regard to advertising, children, tobacco.
14 Q. Did you ask at that time who were -- why they
15 needed this information?
16 A. I don't recall whether I asked or not. I
17 assumed they were working for a client.
18 Q. Did you know who the client was?
19 A. I assume there were several clients, but -- I
20 take that back. I'm not sure.
21 Q. Who do you believe the clients were?
22 A. I assume some of it was done for Shook, Hardy.
23 Q. Why did you assume that?
24 A. I believe I was told that.
25 Q. By who?

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1 A. Tom O'Guinn.
2 Q. Was Tom O'Guinn also working for Shook, Hardy?
3 A. I believe he was doing consulting for them.
4 Q. Is he also associated in some way with Tree
5 House?
6 A. Yes.
7 Q. What is his position with Tree House?
8 A. I don't know what the formal title was.
9 Q. What is your understanding?
10 A. He was a founder or founder.
11 Q. So he was a principal in Tree House, correct?
12 A. Yes.
13 Q. Was he the person who approached you?
14 A. Yes.
15 Q. When he approached you he said that we need you
16 to look at some information on behalf of the tobacco
17 industry about cigarettes and advertising?
18 A. I don't recall his exact words, but --
19 Q. Is that the general gist?
20 A. Certainly those things were included in them.
21 Q. Did he also say he wanted you to review this
22 article by DiFranze that's caused some concern in the
23 industry?
24 A. I don't recall.
25 MR. PURVIS: Object to the form of the
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1 question.

2 BY MR. O'FALLON:

3 Q. Was that the general gist of what he was asking
4 you?

5 A. Was what?

6 Q. That he wanted you to review this DiFranze
7 article because it had caused some great concern to
8 the industry?

9 A. I don't recall. I think he said why. He wanted
10 me to take a look at it and give my opinion about it.

11 Q. Did you understand when you took the position
12 that the tobacco industry was not very happy with the
13 DiFranze article?

14 MR. PURVIS: Object to the form of the
15 question.

16 THE WITNESS: I'm sorry could you
17 rephrase it?

18 BY MR. O'FALLON:

19 Q. What don't you understand about it?

20 A. Could you repeat it?

21 MR. O'FALLON: Read it.

22 (Record read.)

23 BY MR. O'FALLON:

24 Q. Let me restate. Was it your understanding when
25 you were approached by Mr. O'Guinn to review the

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1 DiFranze article that the tobacco industry was not
2 very happy with the DiFranze article?
3 A. I'm not sure I knew one way or the other at that
4 time.
5 Q. Did you later come to understand that?
6 A. I certainly would have assumed that after having
7 read them.
8 Q. How long was your relationship with Tree House?
9 A. It happens on and off.
10 Q. So you still have an ongoing relationship with
11 Tree House, correct?
12 A. I'm not doing anything for them currently,
13 but --
14 Q. When was the last time you did something for
15 Tree House?
16 A. I don't know. I guess if you want me to guess.
17 Q. I want you to give me your best approximation.
18 A. I would say about a year ago. I'm not really
19 positive though.
20 Q. So one of the things you did was you reviewed
21 the DiFranze article for Tree House, correct?
22 A. Correct.
23 Q. And then did you report on that article back to
24 Tree House?
25 A. I believe I did.

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1 Q. And did you do that in the form of an oral
2 statement or a written statement?
3 A. I don't recall at this point.
4 Q. Do you still have a file concerning Tree House?
5 A. What do you mean by file?
6 Q. Do you not understand what a file is?
7 A. Well, there is lots of things. I'm not sure
8 exactly what it is you're referring to.
9 Q. Do you have a place somewhere in your office or
10 somewhere on your computer where you keep the
11 information that you've generated either on behalf of
12 Tree House or have sent to Tree House?
13 A. I have a place where I keep bills.
14 Q. How about your own work product; do you have any
15 place where you keep any of your work product?
16 A. I don't believe I have any of that any more.
17 Q. What did you do with it?
18 A. If I produced something I would have shipped
19 that off.
20 Q. You didn't keep a copy of it?
21 A. I don't recall.
22 Q. Wouldn't you have a copy of it somewhere in your
23 files?
24 A. Routinely I kind of clean my files, so not
25 necessarily.

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- 1 Q. How about on your computer?
2 A. That's what I'm talking about.
3 Q. You don't keep a hard copy of a report you send
4 to somebody you do consulting work for?
5 A. There was no real reports. Occasionally there
6 would be some notes about an article. No, not
7 necessarily.
8 Q. And it's your testimony that you don't have any
9 of the work papers or reports or memos or
10 correspondence or anything from your work with Tree
11 House?
12 A. I believe I have a copy of a report in which I
13 contributed. I don't know that I have my part of it.
14 Q. What's the name of that report?
15 A. I don't recall what the name is.
16 Q. Who else did you work on that report with?
17 A. I just provided some notes for parts of it. I
18 don't know.
19 Q. What's the report? You say you've got a report
20 of it. What's the name of the report?
21 A. I don't recall the name.
22 Q. Who did you work on it with?
23 A. Tom O'Guinn.
24 Q. So you've got in your files a report that you
25 and Tom O'Guinn put together?

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- 1 A. A report that we worked on, yeah.
2 Q. How long is that report?
3 A. A few pages. I'm not quite sure, ten, fifteen
4 pages maybe.
5 Q. Do you have any other documents at all other
6 than your bills that involve in any way any of the
7 work you've done for Tree House?
8 A. As I sit here there is nothing else I can think
9 of.
10 Q. How about any of the articles you looked at on
11 behalf of Tree House, do you keep copies of those?
12 A. Yes.
13 Q. Are they marked up?
14 A. They're underlined.
15 Q. So you would have somewhere a file of all the
16 articles you've looked at on behalf of Tree House and
17 marked up and underlined?
18 A. Not specifically listed that way.
19 Q. I mean do you have the physical articles?
20 A. I have the articles.
21 Q. Do you have any notes concerning those articles?
22 A. Not to the best of my recollection.
23 Q. Other than the DiFranze article what else did
24 you review on behalf of Tree House?
25 A. I don't recall specifically which articles.

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1 Q. But you've got them somewhere in your files,
2 right?

3 A. They're mixed in with all the other articles on
4 similar issues.

5 Q. So in essence you started working for the
6 cigarette industry in 1992 when you started doing
7 consulting work at Tree House, correct?

8 MR. PURVIS: Object to the form.

9 THE WITNESS: I started working for
10 Tree House in '92. I don't perceive it as working
11 for the cigarette companies.

12 BY MR. O'FALLON:

13 Q. Whether you perceive, you understand the money
14 you were receiving from Tree House was ultimately
15 being paid for by the tobacco industry, correct?

16 A. I don't have direct knowledge of that.

17 Q. But you have reason to believe that?

18 A. I believe that.

19 Q. Approximately how many hours have you worked for
20 Tree House since 1992?

21 A. I don't know.

22 Q. Give me your best approximation. Again, we have
23 agreed here not to ask how much you've been paid and
24 I don't want to do that, but I do want some level of
25 work you've done in terms of hours.

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1 A. Again, the best I could do would be a rough
2 guess.
3 Q. Give me your best approximation.
4 A. I don't know. Maybe somewhere in the
5 neighborhood of forty or fifty hours. It could be
6 less, it could be more. I really don't know.
7 Q. And that's the entire amount of time you've
8 worked since 1992 to the present?
9 A. That's the amount that I've billed them that I
10 can recall.
11 Q. How about Jones, Day, how many hours have you
12 worked since 1992 for Jones, Day?
13 A. I don't recall, but again, if I were guessing or
14 giving my best approximation I would say it would be
15 about ten.
16 Q. Was all of that work done in 1992?
17 A. I believe so.
18 Q. After 1992 when the work you did for them with
19 the DiFranze article did they contact you again to do
20 any follow-up work?
21 A. Yes, I believe they did.
22 Q. What kind of follow-up work did they ask you to
23 do?
24 A. I believe it was to look at some literature in
25 the area of risk taking.

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1 Q. When did you do that work?
2 A. I don't recall. I think it was '92. It might
3 have spread into '93. I don't recall.
4 Q. Anything after that?
5 A. I don't believe so.
6 Q. In the process of doing that work did you ever
7 meet with any R.J. Reynolds' employees?
8 A. No.
9 Q. What other attorneys at Jones, Day did you deal
10 with?
11 A. None.
12 Q. At Tree House did you ever meet with -- when you
13 were doing the work for Tree House as opposed to the
14 work directly for Shook, Hardy did you meet with the
15 Shook, Hardy lawyers?
16 A. At Tree House?
17 Q. As a part of doing the work for Tree House.
18 A. I'm still unclear about what you mean by that.
19 Q. You worked for Tree House starting in 1992,
20 correct?
21 A. I believe that's correct.
22 Q. As a part of your work with Tree House - and I'm
23 trying to separate that work out from the work you're
24 going to do directly with Jones, Day later on - did
25 you have an opportunity to meet with any lawyers as a
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- 1 part of your work with Tree House?
2 A. Not directly on the things I was dealing with
3 Tree House with.
4 Q. Did Mr. O'Guinn have some indirect dealings with
5 those lawyers as opposed to you?
6 A. He had some dealings with them.
7 Q. Did you ever deal with any representatives of
8 the cigarette industry as part of the work that you
9 did with Tree House?
10 A. No.
11 Q. At any time from 1992 to 1994 before you started
12 work with Shook, Hardy were you asked to be an expert
13 witness on behalf of the cigarette industry?
14 A. I'm sorry. Could you repeat that?
15 Q. At any time prior to 1994 when you started to
16 work with Shook, Hardy & Bacon were you asked to be
17 an expert on behalf of the tobacco industry?
18 A. No.
19 Q. Have we now --
20 A. Can I just clarify? You're referring to expert
21 witness?
22 Q. Yes, expert witness. I assume you were -- when
23 you were consulted by Jones, Day they were consulting
24 you in an expert capacity.
25 A. Yes.

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1 Q. But at that point they hadn't asked to identify
2 you as an expert witness?

3 A. No.

4 Q. And the same for your work with Tree House,
5 right?

6 A. No, they had not asked me.

7 Q. Other than the work we have now talked about is
8 there any other work you've done in your career which
9 you believe was ultimately paid for by the cigarette
10 industry?

11 A. There is nothing else I can think of that I have
12 any reason to believe ultimately was paid for by the
13 cigarette industry.

14 Q. Since 1994 have you worked with any other law
15 firm other than Shook, Hardy & Bacon?

16 A. No, I don't believe so.

17 Q. Other than Shook, Hardy & Bacon and Jones, Day
18 have you ever in your career worked with any other
19 law firm?

20 A. Not that I can recall.

21 Q. From 1994 to the present approximately how many
22 hours of work have you done on behalf of Shook, Hardy
23 & Bacon? Again, I'm looking for a ballpark figure.
24 In other words -

25 MR. O'FALLON: I'm allowed to ask
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1 this, aren't I?

2 MS. TYLER: You're allowed to ask
3 about the time.

4 BY MR. O'FALLON:

5 Q. With that clarification approximately how many
6 hours have you worked with Shook, Hardy & Bacon?

7 A. I'm trying to count it out, but I really don't
8 know. It's really difficult to give you a good
9 answer.

10 Q. Why don't you give me your best approximation.

11 A. If I had to say a number I would go a hundred
12 hours, maybe more. I don't know.

13 Q. Did you draft your own expert report?

14 A. Yes, I did.

15 Q. Did you have it reviewed by the attorneys?

16 A. They looked at it.

17 Q. Did they give you comments?

18 A. I got a couple of spelling errors.

19 Q. Anything else?

20 A. There may have been another comment or two, but
21 not much.

22 Q. Are there any previous drafts of this report
23 still in existence?

24 A. No, I don't believe so.

25 Q. Are there any notes that you made concerning
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- 1 this project that are still in existence?
2 A. Not that I know of.
3 Q. What state and local organizations have you
4 worked on behalf of?
5 A. I've worked for the Texas Department of Health,
6 I've done some work for University Child Development
7 Group. Those are the ones that come to mind.
8 Q. Have we now discussed all of your professional
9 experiences as list in your resume as far as you can
10 recall?
11 A. As far as I recall right now, yeah.
12 Q. Prior to undertaking consultancy work at the
13 University of Minnesota do you have to gain any
14 clearance from your department?
15 A. I need to fill out forms.
16 Q. What kind of forms?
17 A. Consulting forms. I don't know what they're
18 called.
19 Q. Who do you give those forms to?
20 A. Secretary.
21 Q. Who ultimately do you give those forms to?
22 A. I assume it goes to the director of the school
23 and I don't know after that. I assume on up.
24 Q. There is no need, however, to get previous
25 clearance before doing consulting work?

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1 A. That's correct. Well, other than filing these
2 forms.
3 Q. When you receive compensation you're paid, not
4 the school, correct?
5 A. That's correct.
6 Q. Do you carry -- do you teach a full class load?
7 A. Yes.
8 Q. How many classes do you teach?
9 A. Five across three quarters.
10 Q. What are the total hours that you teach in a
11 year? I assume you have varying hours of classes.
12 Is it five three hour classes or --
13 A. Four hour.
14 Q. Five four hour classes?
15 A. Correct.
16 Q. So twenty hours of teaching a year?
17 A. Credits, yeah. Twenty credit hours.
18 Q. So a little over six credits a quarter, six to
19 seven credits a quarter?
20 A. If you averaged it.
21 Q. Two classes?
22 A. Two and one two, two and one.
23 MR. O'FALLON: Why don't we take our
24 lunch break.
25 (Time: 12:20 p.m.)

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1 (Recess taken.)

2 MS. TYLER: I am producing to you a
3 pile of articles which reflect the published articles
4 either authored or co-authored by Ronald Faber as
5 reflected on his CV.

6 We have been unable to locate two published
7 articles. On page 8 of his CV there is an article he
8 co-authored with Tom O'Guinn. It is an abstract
9 entitled Understanding the Idea of Compulsive Buying.

10 The other article is on page 9, co-authored
11 with Judith Pratt entitled Pollution --

12 I should tell you that I have a chapter
13 from the Adler text entitled the Effects of
14 Television Advertising on Children. Professor
15 Faber authored chapter two of that book.

16 Unfortunately my office sent the wrong copy.

17 Ron mentioned that he has a copy at his
18 home and we will try get you a copy tomorrow.

19 As it stands now there are two articles we
20 are unable to locate and don't anticipate locating by
21 tomorrow.

22 So after diligent efforts, you now have the
23 fruits of our labor.

24 MR. O'FALLON: Just so I'm clear about
25 this, when you're talking about published articles,

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1 which part of the CV, just so I'm clear?

2 MS. TYLER: I am referring to
3 documents on page 3 under the heading publications,
4 books, publications, book chapters, journal articles
5 beginning on page 4, page 6 published proceedings,
6 page 8 other publications.

7 MR. O'FALLON: Thank you.

8 MS. TYLER: Ending on page 9 with
9 conference papers and presentations which were not
10 provided.

11 MR. O'FALLON: Thank you.

12 BY MR. O'FALLON:

13 Q. I ask those last groups of papers, Doctor, do
14 you generally have either abstracts or anything that
15 you would have delivered at those presentations
16 available or not?

17 A. I may have some of the papers. Typically if
18 it's not a conference proceeding, it's not a typed up
19 draft.

20 Q. Have you been identified as an expert in any
21 other cigarette litigation?

22 A. No.

23 Q. Have you consulted in any other cigarette
24 litigation other than the Minnesota litigation?

25 A. I'm not sure what you mean by consulted.

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1 Q. When you were retained by Shook, Hardy & Bacon
2 was it your understanding you would be working
3 generically or you would be working specifically on
4 the Minnesota case?

5 A. When I was retained I would say it was more
6 generic.

7 Q. Has that relationship ever moved into a more
8 specific relationship; for instance, you knew you
9 were going to be identified here in Minnesota?

10 A. Correct.

11 Q. When did you agree to testify in the Minnesota
12 case?

13 A. I believe best of my recollection it was
14 sometime in the middle of '96.

15 Q. And to the best of your knowledge you haven't
16 agreed to testify in any other specific piece of
17 litigation in the country?

18 A. No, that's not true.

19 Q. You have agreed?

20 A. Well, testifying, that is true.

21 Q. Be identified as an expert. Have you agreed to
22 allow yourself to be identified as an expert in other
23 pending litigation?

24 A. I'm not sure. I don't know exactly what that
25 means.

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1 Q. Well, you understand that there is a process by
2 which parties designate experts. Do you understand
3 that; where we publicly disclose to each other who
4 our experts are?

5 A. Okay.

6 Q. Do you know whether you've been publicly exposed
7 as an expert in any other cigarette litigation?

8 MR. PURVIS: I can represent that
9 Shook, Hardy & Bacon has not named him as an expert
10 in any other litigation.

11 MR. O'FALLON: Has anybody else?

12 MR. PURVIS: I presume nobody else
13 has.

14 BY MR. O'FALLON:

15 Q. Have you issued any expert reports or issued any
16 reports to Shook, Hardy & Bacon that you believe are
17 going to be used in any other litigation?

18 A. No other expert reports that I know of.

19 Q. Have you drafted any other documents that are
20 similar to either this document you call the AG
21 presentation or your expert report in this case and
22 delivered those to Shook, Hardy & Bacon?

23 A. Similar in what way?

24 Q. Where they contain any opinions.

25 A. Yes.

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1 Q. Relating to cigarettes?

2 A. Yes.

3 Q. What other documents have you delivered?

4 MR. PURVIS: I'm going to object to
5 this line of questioning as being protected again by
6 the work product doctrine.

7 Consultation upon matters other than the
8 State of Minnesota litigation are not relevant to
9 this proceeding and I am going to instruct Professor
10 Faber not to respond to those questions.

11 MR. O'FALLON: Well, I believe
12 anything he has done regarding cigarette litigation
13 would certainly be relevant to his opinions here.

14 MR. PURVIS: He's not relying on other
15 materials other than what's been identified to the
16 State and work he may have done for my law firm on
17 other matters would be confidential.

18 MR. O'FALLON: What do you mean by
19 other matters? If you're talking about other
20 products, I'll agree with you. If you're talking
21 about other cigarette matters, then I won't agree
22 with you.

23 MR. PURVIS: Well, then we're going to
24 have a disagreement.

25 MR. O'FALLON: This gentleman has
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1 testified that he has given new reports concerning
2 cigarette litigation.

3 MR. PURVIS: That's not what he
4 testified.

5 BY MR. O'FALLON:

6 Q. Have you done other reports involving cigarettes
7 or advertising?

8 A. Would you define report for me?

9 Q. Why don't you define report. Let's go back.
10 Memorandum, writings of any type, have you done any
11 other writings of any type --

12 A. Yes.

13 Q. -- concerning cigarette smoking and advertising?

14 A. Yes.

15 Q. What were the general topics of those other
16 writings?

17 A. I'm sorry. I'm not sure what you mean by
18 general topics. You know --

19 Q. What's confusing about the word general topic to
20 you? You have a basic understanding of the phrase
21 general topic, don't you?

22 A. To me the general topic is cigarettes in
23 advertising as we have talked about that.

24 Q. Does it go beyond that; what did you say about
25 cigarettes in advertising?

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- 1 A. Similar things to what's contained in my expert
2 testimony here.
- 3 Q. How many such documents are in existence?
- 4 A. I believe three, maybe four.
- 5 Q. When did you write those reports?
- 6 A. At varying times over the last few years.
- 7 Q. When did you write the first one?
- 8 A. I would guess about '94, maybe '95, early '95.
- 9 Q. Who did you give that report to?
- 10 A. I don't recall the person's name.
- 11 Q. Was it a lawyer at Shook, Hardy & Bacon?
- 12 A. No.
- 13 Q. Was it a non-lawyer at Shook, Hardy & Bacon?
- 14 A. No.
- 15 Q. Well, lawyer or non-lawyer kind of covers
16 everybody at Shook, Hardy & Bacon and so I assume you
17 must have given it to somebody other than Shook,
18 Hardy & Bacon.
- 19 A. Yes, that's true.
- 20 Q. Who did you give it to?
- 21 A. A lawyer. I don't recall his name.
- 22 Q. Who employed that lawyer?
- 23 A. I don't recall the name of the firm.
- 24 Q. Are you sure it was a law firm?
- 25 A. Yes.

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1 Q. Was that law firm paying you for that work?
2 A. No.
3 Q. So you were doing work for Shook, Hardy & Bacon
4 on behalf of the cigarette industry, but you gave a
5 report to a third lawyer and you don't know who that
6 lawyer is?
7 A. Yeah. To another lawyer, yes, that's true.
8 Q. And you don't know who that lawyer worked for?
9 A. I can't recall the name of the firm.
10 Q. Do you know who employed that lawyer other than
11 the law firm who had retained that lawyer for
12 representation?
13 A. No, I don't.
14 Q. Do you know the name of the lawyer?
15 A. As I say I don't recall it.
16 Q. And that report generally related to the same
17 topics that you were opining on here in the Minnesota
18 litigation, correct?
19 A. Some.
20 Q. Which ones?
21 A. Mostly in regard to I believe point of purchase
22 material and some in relation to general consumer
23 behavior.
24 Q. Do you know why that lawyer wanted that report?
25 A. Again, I don't know if it would be characterized
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1 appropriately as a report.
2 Q. Well, what was it?
3 A. It was an affidavit.
4 Q. Was it for use in a specific piece of
5 litigation?
6 A. Yes.
7 Q. What's the name of the litigation?
8 A. I don't recall.
9 Q. But it was smoking and health litigation, right?
10 A. It revolved around smoking, the sale of
11 cigarettes.
12 Q. Did it involve litigation in which an individual
13 was suing a cigarette maker claiming disease as a
14 result of smoking?
15 A. No.
16 Q. What do you recall it involved?
17 A. An owner of a convenience store regarding -- I
18 don't remember if it was city or state ordinance.
19 Some type of ordinance.
20 Q. What specifically did you swear to in that
21 affidavit?
22 A. It's been a long time. I can't give you
23 everything, but it was predominantly talked about
24 issues regarding the role of point of purchase
25 material.

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1 In general it talked I believe somewhat about --
2 well, there may have been some more general topics
3 about advertising or marketing, but predominantly it
4 was in regard to point of purchase material.

5 Q. Is it your understanding that the defendant in
6 that case, whoever that was, submitted your affidavit
7 to the court?

8 MR. PURVIS: Object to the form.

9 BY MR. O'FALLON:

10 Q. Was it a court?

11 A. I believe it was a court case.

12 Q. Was it your understanding that the defendant in
13 that case submitted your affidavit?

14 A. I have no idea.

15 Q. But you officially swore out and signed an
16 affidavit?

17 A. Yes.

18 Q. Do you know where the attorney who you gave that
19 affidavit to was located or where the lawsuit was
20 located?

21 A. I don't recall the name of the town that the
22 lawsuit was. The attorney -- I'm not sure if it's
23 Minneapolis or not, but it's in this area.

24 Q. So this was a Minneapolis attorney you swore at
25 an affidavit for?

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1 A. Well, I wrote the affidavit -- yeah. Well, no.
2 I'm not quite sure what you mean by I did it for.

3 Q. What's confusing about that statement?

4 A. Because I don't know quite who the four
5 represent here.

6 Q. Who did you think you were doing the affidavit
7 for?

8 A. In my opinion I was doing it for Shook, Hardy,
9 Bacon.

10 Q. But you understand when it's submitted in court
11 it's going to be submitted on behalf of a party,
12 correct? Was Shook, Hardy & Bacon being sued in that
13 litigation?

14 A. No.

15 Q. Do you know who was being sued that Shook, Hardy
16 was representing?

17 MR. PURVIS: Object to the form.

18 THE WITNESS: Could you restate the
19 question?

20 BY MR. O'FALLON:

21 Q. Did Shook, Hardy & Bacon ask you to do the
22 affidavit?

23 A. Yes, I believe so.

24 Q. Did Shook, Hardy & Bacon ask you to do that on
25 behalf of a client of theirs?

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1 A. I don't know if it was a client of theirs or
2 not.

3 Q. So you can't testify as you sit here today that
4 they were representing a client at the time they
5 asked you this, right?

6 A. I suppose I can't.

7 MR. O'FALLON: At this point we don't
8 have an attorney client privilege, so --

9 MR. PURVIS: Yes, we do.

10 MR. O'FALLON: Who is the client?

11 MR. PURVIS: I don't know.

12 MR. O'FALLON: Well, Shook, Hardy &
13 Bacon wasn't representing anybody in the litigation.

14 MR. PURVIS: He said he didn't recall.
15 I think it's unfair to ask him about the
16 technicalities of who represents who.

17 MR. O'FALLON: I don't think it's
18 unfair to ask him about the technicalities about an
19 affidavit he swore on.

20 BY MR. O'FALLON:

21 Q. Do you know if it was submitted to a court?

22 A. I don't know what happened to it.

23 Q. Was there a caption on the affidavit? Did it
24 have a case caption on the affidavit; do you remember
25 that?

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- 1 A. I'm not sure what a case caption is.
2 Q. It's the front of the affidavit.
3 A. It had a front.
4 Q. And it says who the parties were. Was there any
5 indication who the parties were?
6 A. Probably there was.
7 Q. Do you recall that?
8 A. Not clearly.
9 Q. What parties do you recall?
10 A. It was a city and I believe it was the woman who
11 owned this -- I assume owned the convenience store.
12 Q. The city was suing a woman --
13 A. No, the other way around.
14 Q. The convenience store was suing the city?
15 A. I believe that's correct. To the best of my
16 knowledge that's what it was.
17 Q. Do you recall whether a tobacco company was a
18 defendant?
19 A. I don't believe so.
20 Q. And you can't state whether or not -- do you
21 know if your affidavit was done on behalf of the
22 woman or the city?
23 A. The woman.
24 Q. And you don't know whether the woman was being
25 represented by Shook, Hardy & Bacon, correct?

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1 A. I don't know.

2 Q. It was submitted somewhere here in Minnesota?

3 A. Yes.

4 Q. Do you know what county?

5 A. No, I don't.

6 MR. O'FALLON: Counsel, will you
7 agree to find and produce that affidavit?

8 MR. PURVIS: If it has been filed in a
9 public proceeding I'll be happy to.

10 MR. O'FALLON: It's a sworn statement.
11 Whether it's been filed or not relating to his
12 opinions that are similar to opinions rendered in
13 this case, I think it's clearly relevant.

14 MR. PURVIS: If it's been filed in
15 some proceeding I'll check on it and if it's a matter
16 of public record you can have it, and if not, we can
17 debate on it from that point.

18 MR. O'FALLON: You're not familiar
19 with the affidavit?

20 MR. PURVIS: I'm not under oath here.

21
22 MR. O'FALLON: Are you familiar with
23 the affidavit or not?

24 MR. PURVIS: I'm still not under oath.

25 MR. O'FALLON: So you're not going to

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1 answer that question?
2 MR. PURVIS: That's correct.
3 MR. O'FALLON: And you're not going
4 to tell me whether Shook, Hardy & Bacon represented
5 the woman?
6 MR. PURVIS: I'm still not going to
7 respond to the questions.
8 MR. O'FALLON: Do you have to be put
9 under oath in order to answer a question?
10 MR. PURVIS: Of this nature I think
11 that would be the only way we will get an answer.
12 MR. O'FALLON: You want me to bring in
13 a motion?
14 MR. PURVIS: You bring the motion.
15 BY MR. O'FALLON:
16 Q. What other documents or writings have you
17 submitted to Shook, Hardy & Bacon other than the
18 document that's been produced in this case now? You
19 now discussed an affidavit. Any other affidavits?
20 A. Yes.
21 Q. Why don't you tell me about those, how many?
22 A. I believe there are three.
23 Q. In addition to the one we have already talked
24 about?
25 A. Yes.

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1 Q. Why don't you tell me about the next one.

2 A. What would you like to know?

3 Q. Was it your understanding that affidavit
4 testimony is sworn testimony?

5 A. No, it wasn't.

6 Q. You didn't understand that you were under oath
7 and had a duty to tell the truth in that affidavit?

8 A. Yeah. I understood that.

9 Q. It usually says I hereby state and depose or
10 something akin to that.

11 A. I don't recall.

12 Q. Prior to your deposition - by deposition, at
13 hearings or trial - in your report is listed as none,
14 right?

15 A. Yes.

16 MR. PURVIS: Just for the record, the
17 CMO requires us to identify all testimony -
18 quote - by deposition, at legislative or
19 administrative hearings or at trial and the dates
20 thereof - end quote. And that's precisely what we
21 did. There are none.

22 BY MR. O'FALLON:

23 Q. Well, when did you give this affidavit for this
24 woman?

25 A. Best of my recollection I'm really not sure, but
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- 1 I would say I think it was 1995. I'm not sure.
2 Q. Was that the first affidavit you have given on
3 behalf of Shook, Hardy & Bacon in the cigarette
4 industry?
5 A. That was the first affidavit I've ever given.
6 Q. When was the next affidavit?
7 A. I don't recall exactly.
8 Q. More or less.
9 A. To the best of my recollection it would be maybe
10 a year, maybe less. I'm not sure.
11 Q. A year ago?
12 A. Yeah back from that.
13 Q. So sometime in 1996?
14 A. To the best of my recollection, yes.
15 Q. Do you remember the case that was involved
16 there?
17 A. I remember one named involved in it.
18 Q. What was that name?
19 A. I believe it was Fusina.
20 Q. Do you know where that case was filed?
21 A. I'm not positive.
22 Q. What's your best recollection?
23 A. My recollection was it was New York.
24 Q. What kind of a case was that?
25 A. It was a tobacco litigation or tobacco case.

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- 1 Q. Was it a case brought by an individual?
2 A. I believe it was class action.
3 Q. What did your affidavit state generally there?
4 A. Generally it spoke to the issues of consumer
5 behavior and the role of various sources in smoking
6 initiation.
7 Q. How long was that affidavit?
8 A. I don't recall.
9 Q. Give me your best estimate.
10 A. I'm really not sure, but if I picked a number it
11 would probably be twenty some pages maybe. I don't
12 know.
13 Q. Was it your understanding that that was again a
14 statement given under oath?
15 A. Yes. Well, can I rephrase that? It wasn't
16 under oath. It was notarized. That's what I would
17 call it.
18 Q. Did you understand when you gave that statement
19 you had a duty to tell the truth?
20 A. Yes.
21 Q. Did you?
22 A. Yes. I just don't know if that means different
23 things. I just wanted to be clear.
24 Q. Do you know whether that affidavit was filed?
25 A. I don't know.

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- 1 Q. But you did formally sign it and send it?
2 A. I did.
3 Q. Do you know on whose behalf that affidavit was
4 being done?
5 A. I assume Shook, Hardy & Bacon.
6 Q. Do you know who of Shook, Hardy's client it was
7 filed on?
8 A. I don't recall.
9 Q. Was it your understanding or recollection it was
10 a tobacco company?
11 A. Yes.
12 Q. But you're not sure which tobacco company?
13 A. That's correct.
14 Q. When was the next affidavit?
15 A. Right around the same time, little after that.
16 Q. So again, sometime in 1996?
17 A. I believe so to the best of my recollection.
18 Q. And do you know who the party was in that case?
19 A. I don't recall the name of the person. It was
20 another case involving a class action.
21 Q. So it was another smoking and health case?
22 A. Well, yes.
23 Q. What kind of allegations did it involve; were
24 they different than the previous case?
25 A. No.

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1 Q. Where was that case venued?
2 A. I believe that was New York as well.
3 Q. Approximately how long was that affidavit?
4 A. Similar length as the other one.
5 Q. What was the general topic of the affidavit?
6 A. Similarly, consumer behavior and its
7 relationship to smoking initiation.
8 Q. Who did you give that affidavit on behalf of to?
9 A. Shook, Hardy & Bacon.
10 Q. And who was their client at the time?
11 A. I don't recall.
12 Q. Is it your understanding that Shook, Hardy &
13 Bacon represents numerous tobacco companies?
14 A. More than one, yes.
15 Q. What is your understanding about which Shook
16 Hardy represents or that you've done work on behalf
17 of?
18 A. What was the question?
19 Q. What is your understanding about those that have
20 basically paid for your time?
21 A. My understanding is that Shook Hardy has paid
22 for my time.
23 Q. Again, we can go through this as many times as
24 you would like. Is it your testimony that Shook,
25 Hardy & Bacon did charge the tobacco companies and
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1 asked for reimbursement that they paid you?

2 A. Again, I don't know what they did.

3 Q. You would assume, in fact, they charged some of
4 the tobacco companies, their clients, for your time,
5 wouldn't you?

6 A. I would understand that.

7 Q. Do you have any idea which tobacco companies
8 they charged for your work?

9 A. I have an idea of a couple ones they have.

10 Q. Who?

11 A. Philip Morris.

12 Q. Who else?

13 A. I believe Lorillard.

14 Q. Anybody else?

15 A. Not that I'm aware of.

16 Q. The third affidavit that I believe you said
17 involved a case in New York, was that filed?

18 A. I don't know.

19 Q. When did you file the fourth affidavit or submit
20 the fourth affidavit?

21 MR. PURVIS: Just for the record,
22 Professor Faber, if there are matters that are
23 underway which have not been publicly identified, I
24 would caution you not to discuss those at this
25 deposition.

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1 They are protected as communications
2 between us, but to the extent you're aware of
3 anything that has been made public, certainly you're
4 free to identify those.

5 THE WITNESS: To the best of my
6 knowledge I don't know if this has been made public

7 MR. O'FALLON: I'm entitled to get
8 into that if he submitted an affidavit.

9 MR. PURVIS: I will represent to you
10 he has not submitted an affidavit and we will not
11 reveal the matter he may be working on because that
12 would be protected. It may never be made public.

13 MR. O'FALLON: You're going to jump on
14 the record and say he's wrong when he says he's made
15 four affidavits?

16 THE WITNESS: I've had a hard time
17 recognizing the distinction of the documents.

18 MR. O'FALLON: I'm not sure it's
19 appropriate for counsel to start testifying now when
20 he refused to do so now, so the fact of the matter is
21 if this man has submitted another document to you,
22 I'm am entitled to know that.

23 MR. PURVIS: If it is a matter that is
24 not a matter of public record I don't think you are.

25 MR. O'FALLON: I'm entitled to know if

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1 he submitted a writing to you.
2 BY MR. O'FALLON:
3 Q. Have you submitted another writing other than
4 the three you've discussed?
5 A. Yes.
6 Q. Was that writing in the form of an affidavit?
7 A. I don't know. I don't recall what form it was
8 in.
9 Q. When do you think you submitted it?
10 A. I would think it was probably this past June.
11 Q. Was is it your understanding that you prepared
12 that document for a specific piece of litigation?
13 A. No.
14 Q. Was it or was it not an affidavit?
15 A. I don't recall what it was titled.
16 Q. You know what an affidavit looks like, right?
17 A. Vaguely, yes.
18 Q. This would be the fourth one you've done. Was
19 it basically in that format?
20 A. It was basically in a similar kind of format,
21 but there is a lot of things that are in that kind of
22 format. I don't recall.
23 Q. On the previous affidavits were they actually
24 drafted by Shook, Hardy & Bacon and sent to you for
25 signature?

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1 A. No, they were not.
2 Q. So you did the entire affidavit on your own
3 computer?
4 A. I did the entire affidavit, yes.
5 Q. On your computer?
6 A. Yes.
7 Q. And it was produced right there in your offices
8 here at the University of Minnesota?
9 A. No, it was not.
10 Q. Where was it produced?
11 A. My home.
12 Q. And you then took it off and signed it and sent
13 it back?
14 MR. PURVIS: Object to the form of
15 the question.
16 BY MR. O'FALLON:
17 Q. You signed the affidavit here before a notary
18 public, correct?
19 A. That's correct.
20 Q. And the document you signed was the document you
21 produced and put in final form and printed on your
22 own printer here in Minnesota, correct?
23 A. My home, yes.
24 Q. And you then took that someplace and signed it
25 before a notary public?

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- 1 A. Correct.
- 2 Q. And then you put it in an envelope and mailed it
- 3 to Shook, Hardy & Bacon?
- 4 A. I believe it was in an envelope. It may have
- 5 been a Fed-Ex package.
- 6 Q. And you've done that with four such documents,
- 7 three affidavits and a fourth you don't know what it
- 8 was?
- 9 A. Well, a fifth if we include this, the expert
- 10 statement here.
- 11 Q. What kind of statements were included in the
- 12 fourth affidavit, what topics?
- 13 A. Same general topics.
- 14 Q. That fourth document, did you sign it before
- 15 sending it out?
- 16 A. I believe so. I'm not sure.
- 17 Q. Did you sign it in front of a notary?
- 18 A. I believe so.
- 19 Q. Are there any other documents other than the
- 20 ones we have discussed that you have submitted or
- 21 sent to Shook, Hardy & Bacon that regard or concern
- 22 in any way cigarette smoking and advertising?
- 23 A. Can you tell me what you're referring to when
- 24 you say documents?
- 25 Q. What confuses you about that word, sir?

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- 1 A. It could include letters, bills.
2 Q. I'll exclude bills, but it certainly includes
3 letters.
4 A. Then no.
5 Q. How many letters have you sent to Shook, Hardy &
6 Bacon in the last four years, three years?
7 A. I don't know.
8 Q. Numerous?
9 A. Yes.
10 Q. Did those letters involve substantive issues?
11 A. No.
12 Q. They were simply letters submitting bills?
13 A. Yes.
14 Q. Were there any letters that involved substantive
15 issues other than simply submitting bills and
16 charges?
17 A. None that I recall.
18 Q. Any other documents that you've submitted to
19 Shook, Hardy & Bacon or any other law firm related to
20 cigarette smoking and advertising?
21 A. Not that I recall.
22 Q. Have you ever sent Shook, Hardy & Bacon or any
23 other law firm a disk, a computer disk, with
24 information on it concerning cigarette advertising
25 and health?

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1 A. Not that I recall, no.
2 Q. Have you ever received documents from Shook,
3 Hardy & Bacon?
4 A. Yes.
5 Q. What type of documents?
6 A. I received the Minnesota items that are listed
7 in the two letters that were referred to earlier.
8 Q. Anything else?
9 A. Yes.
10 Q. What?
11 A. I received some material regarding the New
12 Zealand toxic substance board.
13 Q. What was that exactly?
14 A. It was a report dealing with New Zealand and the
15 decision there of whether or not to ban cigarette
16 smoking or limit it. I don't recall the exact thing
17 that was going on there.
18 Q. Is that included on your list of referenced
19 materials?
20 A. I don't see it listed, no.
21 Q. Is that document that you used or relied upon in
22 any way in this report?
23 A. Not directly.
24 Q. Did you rely on it indirectly?
25 A. I may have found some of these other cites
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1 through it.
2 Q. What was the general conclusion of that
3 particular report, do you recall?
4 A. That particular report I believe was in favor of
5 banning cigarette smoking or restricting it in some
6 form.
7 Q. Did you agree with the recommendation of that
8 report?
9 A. I'm sorry. I did find it listed here.
10 Q. Where is it at?
11 A. On the second page of principle references.
12 Well, this is a report that came with it.
13 Q. I'm sorry?
14 A. The top one on the second page.
15 Q. But is that only part of it?
16 A. That was the scientific review so that was the
17 response to the original report.
18 Q. But you also have the original report, correct?
19 A. I believe I did, yes.
20 Q. So the response was done on behalf of who?
21 A. I'm not sure who it was done on.
22 Q. Looks like it was commissioned by the Tobacco
23 Institute of New England, right?
24 A. It would appear that way.
25 Q. So what you relied on is that document that the
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1 tobacco industry submitted?

2 A. That's correct.

3 Q. And what you've omitted is the government report
4 itself which favored an advertising ban, correct?

5 MR. PURVIS: Object to the form.

6 THE WITNESS: In both cases I didn't
7 directly rely on what was stated here, but the
8 sources that were used here I went back and checked
9 on.

10 BY MR. O'FALLON:

11 Q. In any event shouldn't both be listed?

12 MR. PURVIS: Object to the form. Dan,
13 you know the case management requires this witness to
14 list the materials that he has relied on.

15 MR. O'FALLON: He said he reviewed
16 this material in the same way he viewed the other
17 material.

18 MR. PURVIS: It's not his list of
19 things he relied on.

20 MR. O'FALLON: Sir, he just testified,
21 if you were listening, that he relied on this report
22 in the same fashion as he relied on the other report,
23 the New Zealand report; is that correct?

24 THE WITNESS: I did look at both.

25 BY MR. O'FALLON:

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1 Q. And you used both in arriving at some of your
2 opinions here, correct?

3 A. I can't say that I relied on the original
4 report, but I looked at both of them. I just don't
5 recall which was which.

6 Q. I thought you said you relied on the first
7 report in order to get some of the references.

8 A. I'm not sure. They may have been in both places
9 I just don't recall where they were.

10 Q. In any event you still have that report that was
11 given to you by Shook, Hardy & Bacon in your
12 possession, correct?

13 A. I believe so.

14 Q. Do you recall the formal name of that report?

15 A. No, I don't.

16 Q. Now, when you arrive at your opinions you
17 certainly want to look at both sides of the story,
18 don't you?

19 A. Correct.

20 Q. And yet it appears in this instance you at least
21 only relied on one side of the story, correct?

22 MR. PURVIS: Object to the form.

23 THE WITNESS: Could you repeat that?

24 BY MR. O'FALLON:

25 Q. You've only relied on one side of the story

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1 regarding the proceedings in New England, correct?

2 A. I don't think that, no.

3 Q. Did you rely on both sides of the story?

4 A. I looked at both. I made an independent
5 assessment of what I believe.

6 Q. You rejected one and adopted the other, correct?

7 MR. PURVIS: Object to the form.

8 THE WITNESS: I looked at both. I
9 don't know that I would wholeheartedly go one in the
10 other.

11 I looked at both and then went on and
12 looked at other things.

13 BY MR. O'FALLON:

14 Q. Did both of them play some part in your opinions
15 in this case?

16 A. I can't say what I pulled out at this point.

17 Q. Sir, you're the best one qualified to do that.

18 A. Well, I'm trying my best. I really don't know.

19 Q. At least it doesn't appear that you've listed it
20 as a source. The only thing you've listed as a
21 resource is the tobacco industry's rebuttal to that
22 form, correct?

23 MR. PURVIS: Object to the form.

24 THE WITNESS: I appear to have listed
25 only one of the reports yes.

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1 BY MR. O'FALLON:

2 Q. Don't you think you should consider both so you
3 can consider both so I can look at both when
4 evaluating your opinion?

5 MR. PURVIS: Object to the form.

6 THE WITNESS: I don't know.

7 BY MR. O'FALLON:

8 Q. You would agree that when you do research or
9 give an opinion that it's important to have the whole
10 story, correct?

11 A. Correct.

12 Q. It's important to get as much information as you
13 can, right?

14 A. Correct.

15 Q. And presumably you want to look at that
16 information and balance and weigh that information as
17 part of your decision-making process, correct?

18 A. Correct.

19 Q. And that's, in fact, what you did with the New
20 England report, right; you looked at it, weighed it
21 and balanced it, correct?

22 MR. PURVIS: Object to the form.

23 THE WITNESS: Could you rephrase
24 that?

25 BY MR. O'FALLON:

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1 Q. When you looked at that New Zealand report did
2 you look at that and consider that and balance that
3 in arriving at your opinion?

4 A. I looked at all the information and did not
5 arrive at an opinion at that point, and of course it
6 was an ongoing process.

7 Q. Which is how you eventually arrived at your
8 opinion, correct?

9 A. Yes.

10 Q. How many other documents have you looked at and
11 rejected as listing here sources in arriving at your
12 opinion?

13 MR. PURVIS: Object to the form.

14 BY MR. O'FALLON:

15 Q. How many other documents are there like this New
16 Zealand report that you've looked at, but since they
17 don't support what you say I want to say and haven't
18 listed?

19 MR. PURVIS: Object to the form. The
20 requirement is that this witness list documents in
21 support of his or her opinion.

22 MR. O'FALLON: Right, and what I'm
23 asking is what else he's looked at and rejected.

24 BY MR. O'FALLON:

25 Q. We have got the New England report recommending
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1 a ban of advertising. Anything else?

2 MR. PURVIS: You keep saying New
3 England, anything else.

4 BY MR. O'FALLON:

5 Q. I'm sorry. New Zealand.

6 A. There are many other smoking related articles
7 that I've looked at that I have not listed here as
8 being a part of what I'm relying on.

9 Q. The Surgeon General's report, did you ever look
10 at that?

11 A. I've seen parts of that, yes.

12 Q. The 1994 Surgeon General's report, you've seen
13 parts of that?

14 A. I don't recall the date.

15 Q. The 1994 Surgeon General's report is the Surgeon
16 General's report that deals with cigarette
17 advertising. Did you review that?

18 A. I've seen parts of it, yes.

19 Q. And I take it you've rejected the findings
20 there?

21 A. I disagree with them, yes. Could we be more
22 specific in terms of which findings just so we're
23 clear?

24 Q. Which findings did you reject?

25 A. The overall finding that advertising contributed

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1 to cigarette smoking.

2 Q. Which findings did you accept?

3 A. I'm not recalling what other findings there may
4 have been. That's why I'm asking.

5 Q. Do you recall whether you accepted any of their
6 findings?

7 A. I don't recall.

8 Q. In any event, you didn't rely on any of their
9 findings or any of their research in arriving at this
10 report, correct?

11 A. I looked at those findings and if sources that
12 they cited were in my opinion well done and relevant,
13 I looked at them and included them.

14 Q. In other words, you selectively picked the
15 references out of the Surgeon General's report that
16 you relied upon here in this report, correct?

17 A. I've included here the articles that I've relied
18 on and my findings.

19 Q. And the Surgeon General's report from 1994 is
20 not one of the articles you've relied on, correct?

21 A. Not directly.

22 Q. Have you relied on it indirectly?

23 A. In the sense that some of these cites are also
24 in there.

25 Q. Do you plan to testify about that report at
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1 trial?
2 A. I don't know.
3 Q. What other documents have you been sent by
4 Shook, Hardy & Bacon?
5 A. I believe I saw transcripts of some testimony.
6 Q. What testimony?
7 A. I believe it was a professor by the name of Joel
8 Cohen.
9 Q. Do you know where he testified?
10 A. I don't recall now.
11 Q. What was his general expertise, do you recall?
12 A. He is in the area of marketing.
13 Q. Was he testifying on behalf of the plaintiffs or
14 on behalf of the cigarette industry?
15 A. Plaintiffs.
16 Q. Anything else?
17 A. There may have been testimony from a couple
18 other people. I just don't recall.
19 Q. Anybody who's given testimony here in the State
20 of Minnesota case?
21 A. Not to the best of my knowledge. Well, I'm
22 sorry. Have I ever been sent anything by Shook,
23 Hardy & Bacon?
24 Q. I'm asking you for every document you've ever
25 been sent by Shook, Hardy & Bacon.

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- 1 A. I'm sorry. Yes. I have seen the expert
2 statements of some Minnesota witnesses.
3 Q. Which ones?
4 A. Cheryl Perry and I believe Professor Dolin.
5 Q. Anything else?
6 A. I believe I've also been sent copies of their
7 depositions.
8 Q. Have you read those?
9 A. Not fully, no. I've looked through them, but
10 not fully.
11 Q. What else.
12 A. That's all that comes to mind.
13 Q. Have you been sent any other articles or
14 proceedings by Shook, Hardy & Bacon?
15 A. Not to the best of my recollection.
16 Q. Let me rephrase that.
17 A. No. No, I have not. I'm sorry.
18 Q. Was there something else you were thinking of?
19 A. No. I was just trying to be as complete as I
20 could.
21 Q. When you were sent the documents that are
22 referenced in Plaintiffs' Exhibit 3314 and 3315 in
23 the State of Minnesota documents did you request
24 those documents?
25 A. No, I didn't.

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1 Q. They were selected by the attorneys and sent to
2 you?

3 A. They were represented to me as -- well, let me
4 rephrase that. I did request -- I was told that
5 there was some surveys from Minnesota and I requested
6 to see those, have some data from Minnesota.

7 Q. When did you first receive those documents?

8 A. I would guess about a week or so ago.

9 Q. Have you had a chance to read all of those
10 documents?

11 A. Not completely. I've had a chance to look
12 through them, but not fully read them.

13 Q. Did they form any part of your opinion as you
14 sit here today?

15 A. As I sit here today?

16 Q. Yes.

17 A. They tend to reinforce, be consistent with my
18 opinion.

19 Q. Is there anything in those documents that would
20 have been changed in any way your opinions?

21 A. I'm sorry?

22 Q. Is there anything in those documents that has
23 changed in any way your stated opinions?

24 A. Not that I can recall, no.

25 Q. Have you ever been sent documents by any other

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1 law firms?
2 A. Other than those we have discussed?
3 Q. Yes, and other than Shook, Hardy & Bacon.
4 A. As I mentioned, the DiFranze articles from
5 Jones, Day.
6 Q. Have you ever been sent anything else by Jones,
7 Day?
8 A. Not to the best of my recollection, no.
9 Q. How about Tree House, have you ever been sent
10 any other documents by Tree House?
11 A. They have sent me documents, yes.
12 Q. Any concerning smoking and health?
13 A. Yes.
14 Q. What documents did they send you concerning
15 smoking and health?
16 A. I don't recall.
17 Q. What type of documents were they?
18 A. Journal articles.
19 Q. When did they send you those?
20 A. Various times.
21 Q. Did you request those or did they send them to
22 you yourself?
23 A. I requested them.
24 Q. How did you happen to come across those articles
25 so that you could request them?

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- 1 A. Some I saw in references from other articles.
2 Some I found -- I'm sorry.
3 Q. Some you found what?
4 A. Some I found from computer search.
5 Q. Have they ever sent you articles that you did
6 not solicit?
7 A. Not to the best of my recollection.
8 Q. Who are the other principals in Tree House?
9 A. I don't know.
10 Q. Do you know any of them?
11 A. I don't know if there are other principals. I'm
12 not sure.
13 Q. Mr. O'Guinn is the only owner?
14 A. He may be. I'm not sure.
15 Q. Is he the only person you've worked with there?
16 A. I've worked with other people there.
17 Q. Who else have you worked with there?
18 A. Peter Neumann.
19 Q. Who else?
20 A. A woman by the name of Gena. I don't know her
21 last name.
22 Q. How large are their offices?
23 A. I don't know.
24 Q. Have you ever been to their offices?
25 A. No, I haven't.

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1 Q. Mr. O'Guinn, is he a professor?
2 A. Yes.
3 Q. Where is he a professor?
4 A. University of Illinois.
5 Q. When did you first meet him?
6 A. I believe it was 1981 or '82.
7 Q. Do you know how long he's been working for the
8 tobacco industry?
9 A. I don't know that he works for the tobacco
10 industry.
11 Q. Well, we can play this word game all day long if
12 you want. Do you understand when I say "works for,"
13 I mean ultimately is paid by the tobacco industry,
14 his bills are paid by the tobacco industry? Can we
15 have that agreement?
16 A. Okay.
17 Q. So to that extent you would work for the tobacco
18 industry, right?
19 MR. PURVIS: Object to the form.
20 THE WITNESS: I still view it and it
21 would be easier to get through this if you could just
22 say the lawyers.
23 BY MR. O'FALLON:
24 Q. That wouldn't comport with reality though, would
25 it, sir?

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1 MR. PURVIS: Object to the form.

2 THE WITNESS: I believe it does.

3 BY MR. O'FALLON:

4 Q. Is there any doubt in your mind that it isn't
5 Philip Morris and Lorillard that ultimately pay your
6 bills?

7 A. I believe they pay Shook, Hardy & Bacon.

8 Q. And so ultimately the money that goes to you
9 comes from the tobacco industry, right?

10 A. In a sense, right.

11 Q. In a fairly concrete sense, right?

12 A. If we don't play semantics, yes.

13 Q. It's not a matter of semantics, it's a matter of
14 fact, isn't it, sir?

15 MR. PURVIS: Object to the form.

16 THE WITNESS: To me it's a matter of
17 semantics too.

18 BY MR. O'FALLON:

19 Q. How long to the best of your knowledge has Mr.
20 O'Guinn worked for or has ultimately been compensated
21 by the tobacco industry?

22 A. I don't know.

23 Q. At least since 1992, correct?

24 A. I believe so, yes.

25 Q. Do you think he had a relationship with law

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1 firms representing the tobacco industry prior to that
2 time?
3 A. I'm not sure.
4 Q. Did he ever discuss that with you between 1981
5 and 1992?
6 A. He may have. Maybe 1991. I'm not sure.
7 Q. When he approached you to work on behalf of the
8 industry in 1992 what did he say?
9 A. He approached me to work for Tree House by
10 asking me to -- if I believe - and again, my
11 recollection on this is not great - to examine some
12 articles.
13 Q. Who did he tell you he was working for at that
14 time?
15 A. I'm not sure. I assume he told me -- I believe
16 he told me Shook, Hardy & Bacon.
17 Q. And did he say something to you at that time
18 that led you to believe that Shook, Hardy was the law
19 firm representing the tobacco industry?
20 A. I don't recall exactly, but it's possible.
21 Q. Is it probable?
22 A. It's probable.
23 Q. Am I correct that you're not relying on any
24 internal tobacco company documents for your opinions?
25 A. Yes, that's correct.

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- 1 Q. Have you ever asked to look at the internal
2 tobacco company documents?
3 A. No, I haven't.
4 Q. How come?
5 A. Because I've been asked to look at what the
6 actual impact of advertising is.
7 Q. Don't you think that the industry measures what
8 the actual impact of their advertising is?
9 A. Not with regard to primary demand.
10 Q. How do you know that if you've never looked at
11 their documents?
12 A. It really didn't matter. The major impact would
13 be what the effects would be.
14 Q. Don't you think the industry itself would be
15 measuring the actual effects of its own ads?
16 A. On brands, not necessarily on product
17 categories.
18 Q. Don't you think they would be looking at the
19 whole mix?
20 A. No, they don't.
21 Q. How do you know that if you've never looked at
22 their internal documents?
23 A. No, they don't.
24 Q. How do you know that if you've never looked at
25 internal company documents?

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1 A. I can't say that I know everything that would be
2 in them, but to the best of my knowledge what they
3 would look at would be what they're trying to
4 accomplish and what impacts brands.

5 Q. How do you know that? You're guessing, aren't
6 you?

7 A. I'm assuming.

8 Q. You're guessing.

9 MR. PURVIS: Object to the form.

10 BY MR. O'FALLON:

11 Q. You have absolutely no idea what cigarette
12 manufacturers have done to measure the effect of
13 their own advertising, do you?

14 A. I don't know -- well, I know that they've done
15 research to examine the effects of brands, but not of
16 the primary product.

17 Q. How do he know that? You've never looked at
18 their documents. How can you possibly sit here and
19 testify to that?

20 A. I cannot tell you that -- I don't know that.

21 Q. You don't know whether or not they've actually
22 looked at whether their advertising as a directed as
23 opposed to a secondary effect, do you?

24 MR. PURVIS: Object to the form.

25 THE WITNESS: I don't know.

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1 BY MR. O'FALLON:

2 Q. You don't know what the cigarette companies have
3 evaluated as to any of the their advertising and the
4 effect of their advertising, do you?

5 A. I don't know.

6 Q. And you don't know whether or not the cigarette
7 companies have hired marketing agencies and
8 advertising agencies to go out independently and
9 evaluate the effect of their advertising, do you,
10 sir?

11 A. I'm sure they have.

12 Q. But you haven't looked at any of those
13 documents, have you?

14 A. No, because they look at brands.

15 Q. You don't know that because you haven't seen the
16 documents, right?

17 A. I have not.

18 Q. So without seeing the documents you can't tell
19 me they're just looking at brands, can you?

20 A. I cannot be one hundred percent sure to tell you
21 that.

22 Q. You cannot even be more likely than not, can
23 you? You haven't seen a thing, have you?

24 A. I have not looked at the documents.

25 Q. And you have no idea whether or not the

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1 cigarette industry does just brand advertising, do
2 you, without looking at the documents?

3 A. Whether they try to do it or not, the evidence
4 indicates that it does not occur.

5 Q. Which evidence? You haven't looked at one
6 internal company document. Don't you think that
7 would be evidence of what they were trying to do?

8 MR. PURVIS: Object to the form.

9 THE WITNESS: What they were trying to
10 do is irrelevant to the question what they
11 accomplished.

12 BY MR. O'FALLON:

13 Q. Don't you think they also do research to figure
14 out what it is they have accomplished?

15 A. In regard to brands, yes.

16 Q. And you can't tell me they don't do it with
17 regard to general product advertising because you've
18 never looked at the documents, have you?

19 MR. PURVIS: Object to the form.

20 THE WITNESS: Most don't. I don't
21 know.

22 BY MR. O'FALLON:

23 Q. But you don't know because how many times have
24 you went in and actually looked at tobacco companies'
25 advertising documents, have you?

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- 1 A. I have not gone in and looked at them.
2 Q. Have you ever gone into any companies'
3 documents, any companies' files and looked at all of
4 their advertising documents?
5 A. No.
6 Q. Have you ever went and even looked at some of
7 their advertising documents?
8 A. Any company or cigarette?
9 Q. Any cigarette company.
10 A. No.
11 Q. You have not seen one internal cigarette
12 document, correct?
13 A. That's correct.
14 Q. And you feel that you can render a valid opinion
15 on the effect of cigarette advertising without ever
16 having looked at even one cigarette document?
17 A. Yes.
18 Q. Would it surprise you that the cigarette
19 companies do extensive focus group studies?
20 A. No.
21 Q. Would it surprise you that the cigarette
22 companies do extensive top of mind awareness studies?
23 A. No.
24 Q. Would it surprise you that they do a great deal
25 of tracking research concerning consumer sales?

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1 A. For their brands, no.

2 Q. For their products, sir, for all of their
3 products.

4 MR. PURVIS: Object to the form.

5 THE WITNESS: No.

6 BY MR. O'FALLON:

7 Q. Would it surprise you that they've done research
8 among high school students to find out what
9 percentage of those students smoke and why they
10 smoke?

11 A. I don't know, but, no.

12 Q. Would it surprise you if the cigarette
13 manufacturers have hired outside manufacturers to
14 actually evaluate why people start to smoke?

15 A. No.

16 Q. Wouldn't you want to see their analysis of that
17 problem?

18 A. Not necessarily.

19 Q. You would rather just remain ignorant of that,
20 correct?

21 MR. PURVIS: Object to the form.

22 THE WITNESS: No.

23 BY MR. O'FALLON:

24 Q. And you have never asked your counsel sitting
25 right next to you, give me all the documents from the
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1 cigarette manufacturers that involve smoking
2 initiation, have you?
3 A. No, I have not.
4 Q. You could have asked that question, right?
5 A. I'm not sure one person is capable of going
6 through all of those, whatever exists.
7 Q. My law firm went through thirty million
8 documents so apparently somebody is capable of doing
9 it.
10 A. I assume your law firm is more than one person.
11 Q. I assume Shook, Hardy & Bacon is more than one
12 person. Have you ever asked for that information?
13 A. No.
14 Q. You don't think that's information you need to
15 form a valid opinion?
16 A. No.
17 Q. You're perfectly comfortable forming an opinion
18 as to what motivates people to smoke knowing you're
19 excluding the research the tobacco industry has done
20 over the last forty or fifty years?
21 A. Given what exists in the published literature, I
22 am confident of it, yes.
23 Q. How do you know that they don't have unpublished
24 studies?
25 A. I don't know that what they have or don't have.
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1 Q. Right. So they may well have extensive
2 unpublished studies, correct?
3 A. I don't know.
4 Q. They may well have extensive focus analyses of
5 individual smoking campaigns, right?
6 A. Quite possible.
7 Q. They may well have documentation concerning
8 whether or not and why youths start to smoke,
9 correct?
10 A. They might.
11 Q. But you don't want to see those.
12 MR. PURVIS: Object to form.
13 THE WITNESS: To me that's irrelevant
14 of the question of does it create this.
15 BY MR. O'FALLON:
16 Q. Are you aware of how much the cigarette
17 companies spend each year on advertising?
18 A. Roughly.
19 Q. What do you think they spent in 1994?
20 A. I don't know.
21 Q. What do you think they spent in overall
22 marketing in 1994?
23 A. I don't know.
24 Q. How about four billion dollars, would that
25 surprise you?

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- 1 A. In overall marketing?
2 Q. Yes.
3 A. When you talk about marketing, what specifically
4 are you talking about?
5 Q. Their whole marketing mix, advertising,
6 promotions?
7 A. Including product?
8 Q. What do you mean?
9 A. Part marketing is the product.
10 Q. Well, actually no. I'm talking about things
11 simply to promote the product. If we included the
12 product we would be well above that mark.
13 A. Okay. But I am trying to get you to tell me
14 exactly what it is you're referring to so I get a
15 sense of whether or not it would surprise me or not.
16 Q. What is your understanding of what advertising
17 and/or marketing the cigarette companies did in 1994?
18 A. What was the question?
19 Q. What is your understanding of what advertising
20 and/or marketing the cigarette industries did in
21 1994?
22 A. What constitutes marketing?
23 Q. Do you understand they report numbers to the
24 FTC?
25 A. Yes.

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1 Q. Have you seen those numbers?
2 A. I'm not sure if I've seen the numbers from the
3 FTC or not.
4 Q. Do you think those would be helpful?
5 A. I've seen numbers. I don't know.
6 Q. I'm going to hand you a document previously
7 marked as Plaintiffs Exhibit 602. Have you ever seen
8 this document before, sir?
9 A. I believe I have.
10 Q. Have you seen the lines in this that refer to
11 advertising marketing and promotional expenditures,
12 and then estimated advertising, marketing and
13 promotional expenditures reported to the FTC?
14 A. Where are you? I haven't got to you yet.
15 Q. Right here, sir.
16 A. I see lines that do say that.
17 Q. Let's look at Philip Morris and R.J.R. for a
18 minute. The page I'm showing you is a page at the
19 top that says 1987 through 1994, and then a summary
20 column, 1954 through 1994. Do you see that, sir?
21 MS. TYLER: Is the page numbered?
22 MR. O'FALLON: Actually these are not
23 numbered.
24 BY MR. O'FALLON:
25 Q. Do you see where we're at?
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- 1 A. I'm sorry.
2 Q. At the top it says 1987 and then it goes all the
3 way across to 1994, and then there is a summary
4 column, 1954 to '94.
5 A. Yes.
6 Q. And at the top right-hand column it says
7 advertising R&D, and youth prevention.
8 A. Left-hand column or right hand?
9 Q. Left-hand column.
10 A. Yes.
11 Q. And then you see Philip Morris and R.J. Reynolds
12 under that?
13 A. Yes.
14 Q. I'd like you to just look at the numbers for
15 Philip Morris for a minute. This would indicate that
16 in 1994 Philip Morris spent on advertising, marketing
17 and promotion two point two billion dollars, correct?
18 A. Yes, that's what it says.
19 Q. And then from 1954 to 1994 they spent eighteen
20 billion dollars, correct?
21 A. Correct.
22 Q. This would also indicate in 1994 R.J. Reynolds
23 spent about one point four billion dollars; is that
24 correct?
25 A. Yes, that's correct.

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1 Q. And if I were to take you through this - and I
2 did this last night so I'll ask you to trust me -
3 when you add all the advertising that was done,
4 what's defined as advertising, marketing and
5 promotional expenditures done by the cigarette
6 industries in 1994, it comes to just a little over
7 four billion dollars. Is that a number you would
8 agree with?

9 A. I'm sorry. If we added together from what?

10 Q. If I added all the manufacturers together for
11 1994 it would be about four billion dollars.

12 A. If that's what you say, yes.

13 Q. Does that sound roughly correct to you?

14 A. Depends again on -- I can't tell you whether
15 it's correct or incorrect without knowing more about
16 what advertising marketing and promotional
17 expenditures include.

18 Q. And of course to have a good understanding of
19 that you would have to go through the company
20 documents, right?

21 A. I don't know. If you could explain to me what
22 they are I would do it, but I don't know if the
23 company documents would include it or not if they
24 would.

25 Q. You understand the companies report to the FTC?

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1 A. I don't know what goes into the companies'
2 report to the FTC and how they calculate these
3 things.
4 Q. Best way to find out would be to look at the
5 company documents, right?
6 A. I don't know. I suppose.
7 Q. Probably the best way, right?
8 MR. PURVIS: Object to the form.
9 THE WITNESS: I don't know.
10 BY MR. O'FALLON:
11 Q. The company documents usually reveal exactly
12 what the company considers is a promotional
13 expenditure, correct?
14 A. I don't know.
15 Q. Well, what figures do you use in arriving at
16 your numbers as to what is spent by the tobacco
17 industry in advertising and marketing?
18 A. Looking at media advertising.
19 Q. From what source?
20 A. I believe advertising age.
21 Q. Who do you think is a better source how much
22 Philip Morris spent, ad age or Philip Morris?
23 A. I think -- I don't know. I think they would
24 probably give you different numbers, depending on
25 what got added.

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1 Q. Don't you think Philip Morris could probably be
2 the ultimate expert on what they spent on marketing
3 and promotions?

4 A. My belief is probably both groups would be
5 accurate and correct. It's simply what they count.

6 Q. As you sit here today you don't know what Philip
7 Morris counts in its marketing and promotion
8 expenditures, correct?

9 A. I don't know what went into this line.

10 Q. And you don't know what Philip Morris would
11 contend should be because you've never looked at
12 their documents, correct?

13 A. I don't know what they would do for this line
14 here, no.

15 MR. O'FALLON: Why don't we take a few
16 minute break.

17 (Recess taken.)

18 BY MR. O'FALLON:

19 Q. Sir, do you consider yourself to be an expert in
20 advertising?

21 A. Yes.

22 Q. Do you consider yourself to be an expert in
23 marketing?

24 A. Areas of marketing, yes.

25 Q. Which areas?

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- 1 A. Consumer behavior.
2 Q. Anything else?
3 A. Marketing research.
4 Q. Anything else?
5 A. Those are the primary areas.
6 Q. Do you consider yourself an expert in childhood
7 development?
8 A. I'm knowledgeable there, but I wouldn't consider
9 myself an expert.
10 Q. Do you consider yourself an expert in youth
11 behavior?
12 A. As it relates to consumption.
13 Q. Do you have any other areas of expertise that
14 you think are relevant to the opinions that you
15 intend to render in this case?
16 A. If we include areas of consumer behavior as
17 fitting under the marketing part. Some of it goes
18 beyond that.
19 Q. How many controlled studies have you conducted
20 in consumer behavior?
21 A. Could you tell me what you mean by controlled
22 studies?
23 Q. Well, where you gather up a group of people,
24 have one group as a control, the other group as
25 testing your hypothesis and conduct a study.

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1 A. Are you talking only experimental designs or
2 surveys?
3 Q. Let's talk about experimental designs. By the
4 way, how do you control a survey? A survey is just
5 your evaluation of what you have done, correct?
6 A. No. You mean surveys of populations?
7 Q. Not of populations, of samples.
8 A. Of samples of people?
9 Q. Correct. Surveys are by in large not
10 controlled, correct?
11 A. There are controls one can utilize within a
12 survey design.
13 Q. But they're not considered a controlled study,
14 correct?
15 A. It partly depends on how you're using the term
16 control.
17 Q. Well, where we usually use controlled studies is
18 you usually have a null hypothesis and your basic
19 hypothesis, and you have one group serve as a control
20 and one group are where you tested some other
21 influence, correct?
22 A. That's one form.
23 Q. How many of those kind of studies have you done
24 in your career, sir?
25 A. I believe just one study utilized that kind of
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1 experimental design.
2 Q. What study was that, sir?
3 A. The disclosure study.
4 Q. Disclosure or disclaimer study?
5 A. I'm sorry. Disclaimer.
6 Q. That was a study you did when you were still
7 getting your education at the University of
8 Wisconsin?
9 A. That's correct.
10 Q. How many survey studies have you done?
11 A. When you refer to a survey study, are you
12 talking about --
13 Q. It's your term, sir. What are you referring to?
14 A. Well, survey study could involve completely
15 different samples collected -- tested or it could
16 involve the same sample in which multiple different
17 projects are designed to be tested.
18 Q. What's your first definition of a survey study?
19 A. The first one I don't know that I would call it
20 a definition, but the first one involved how many
21 times one collected data independently, regardless of
22 how many different studies were -- projects were
23 being tested or hypothesis were being tested.
24 Q. So the first type of study would be where you
25 basically find one group and then study various

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1 things with that one group?
2 A. It might involve more than one group. You could
3 compare groups.
4 Q. How many surveys as you've defined them have you
5 done here; how many survey studies?
6 A. Again, I'm still not clear.
7 Q. I'm using your definition, sir.
8 A. How many independent times you have collected
9 data as opposed to how many different studies you've
10 done are two different things.
11 Q. How many independent times have you collected
12 data, sir?
13 A. I would estimate about twenty.
14 Q. So you've collected data about twenty times?
15 A. I've been involved; not necessarily me alone,
16 but involved in the collection of data about twenty
17 different projects or twenty different separate
18 surveys.
19 Q. In formulating those surveys what is your usual
20 population?
21 A. You don't use -- what is the population?
22 Q. What do you use as the population to survey?
23 A. The population will vary depending on the
24 different project.
25 Q. What's the largest population you've ever
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1 surveyed?
2 A. I have to go back. I really wouldn't know the
3 actual population size in trying to determine which
4 one it is. I'm not sure which population would be
5 considered the largest.
6 Q. Generally speaking are the populations you study
7 here in the Twin Cities area?
8 A. Most of these have not been. Some have.
9 Q. Where have they mostly been?
10 A. Various places.
11 Q. How do you conduct these surveys?
12 A. There are different ways of conducting surveys.
13 Use different approaches.
14 Q. Do you usually -- does it involve bringing
15 people in or do you call them or how do you usually
16 do it?
17 A. Done both.
18 Q. Do you usually conduct the actual survey itself;
19 do you conduct the questioning?
20 A. Sometimes.
21 Q. And sometimes not?
22 A. Correct.
23 Q. You haven't done any population controlled
24 studies though?
25 A. What do you mean by population controlled

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1 studies?
2 Q. You're not familiar with that term?
3 A. I've heard the term used in different ways.
4 Q. How have you heard it used?
5 A. If you're talking about trying to estimate --
6 well, let me restate that and think about that.
7 No. I'm not quite sure what that population
8 control as a phrase would mean.
9 Q. What kind of controls do you try to impose upon
10 your studies?
11 A. In survey studies or experimental studies?
12 Q. You've only done the one experimental survey so
13 we won't go into that.
14 A. So survey studies?
15 Q. Yes.
16 A. Sometimes we use a group that is not a
17 population under study and we with compare them.
18 Q. Do you make sure their ages match?
19 A. Yeah, sometimes.
20 Q. And sometimes not?
21 A. Depends upon the purpose of the study.
22 Q. Wouldn't you always want them to be age matched?
23 A. Not necessarily.
24 Q. Why?
25 A. That's one form of control that's a very tight
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- 1 control, but works best if you've got a small sample.
2 Q. You can age match fairly large samples, can't
3 you, it just takes a little more work?
4 A. Correct. You can control age without matching
5 works as well.
6 Q. How do you do that statistically? Do you always
7 impose those kind of control on your studies?
8 A. If age is perceived to be an important variable
9 it gets used.
10 Q. Can you imagine any consumer survey that
11 wouldn't have age as an important variable?
12 A. Yes.
13 Q. What kind of study?
14 A. Depends on the purpose of the study. Lots of
15 studies could.
16 Q. You don't think people change their attitudes as
17 they get older?
18 A. In regard to --
19 Q. Advertising, marketing.
20 A. In general?
21 Q. Yes.
22 A. Many of their attitudes are quite consistent
23 over time.
24 Q. But not all of them, right?
25 A. Sure, not all of them.

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- 1 Q. So you think it's acceptable to do a study where
2 you don't have age matching, correct?
3 A. Correct.
4 Q. Approximately what percentage of the studies
5 that you've done, the survey studies you've done,
6 have been age matched?
7 A. I believe three of these studies that I've done
8 have used age match controls.
9 Q. So fifteen percent of the studies you've done
10 have used age matching, correct?
11 A. It seems to be correct, yes.
12 Q. Have you ever designed a commercial advertising
13 or marketing campaign?
14 A. What do you mean by that, designed?
15 Q. What do you usually use the word design to mean?
16 A. Well, if you talk design are you talking from
17 beginning to end or components and have done some
18 work that contributed towards the design?
19 Q. Well, let's start with beginning to end.
20 A. No, I have not done one from beginning to end.
21 Q. Have you ever been primarily responsible for
22 designing a commercial advertising or marketing
23 campaign?
24 A. No, I have not.
25 Q. Have you ever played any part in designing a
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1 commercial advertising or marketing campaign?
2 A. Yes.
3 Q. What one?
4 A. The consulting for agencies we talked about
5 before involving research.
6 Q. What research did you do?
7 A. I did consumer research that contributed to the
8 development and design of their advertising.
9 Q. Have you ever been asked to assess the
10 effectiveness of an advertising campaign?
11 A. Yes.
12 Q. What advertising campaign is that?
13 A. Many campaigns.
14 Q. What ones?
15 A. I couldn't give you all of them.
16 Q. Give me some of them.
17 A. I was a judge for the EFFIE awards. We see
18 probably about sixty to eighty campaigns that we
19 judge for effectiveness and successfulness.
20 Q. How do you judge the effectiveness for the EFFIE
21 awards?
22 A. Well, there are no basic rules, but you get a
23 bunch of information and you try to determine as a
24 judge to the best of your ability how successful a
25 brand was in meeting the objectives set for that

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- 1 brand.
- 2 Q. But you don't go out and do independent research
- 3 such as experimental or survey type research,
- 4 correct?
- 5 A. That's correct.
- 6 Q. Have you ever been involved in a situation where
- 7 you've been asked to do actual research by consumer
- 8 testing or survey research about the effectiveness of
- 9 an ad campaign?
- 10 A. I believe I did a little bit of work on that in
- 11 regard to the seat belt campaign.
- 12 Q. What did you do?
- 13 A. Helped design the research.
- 14 Q. Did you do the research?
- 15 A. Did I collect the data?
- 16 Q. Collect it, analyzed it, put it together.
- 17 A. I did parts of it.
- 18 Q. But you didn't do the whole thing?
- 19 A. No, I did not.
- 20 Q. What part did you do?
- 21 A. Helped to design it and probably did some of the
- 22 analysis and -- that's what I remember.
- 23 Q. You have never analyzed a cigarette advertising
- 24 campaign for effectiveness, correct?
- 25 A. That's correct.

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1 Q. The EFFIE awards are basically subjective
2 awards, correct, sir?
3 A. Certainly to some degree. I think all
4 advertising awards are subjective, yes.
5 Q. More or less a popularity contest?
6 A. No.
7 Q. Something a kin to the Academy Awards or --
8 A. No.
9 Q. No?
10 A. No.
11 Q. You don't consider the judgments in the EFFIE's
12 to be relatively subjective judgments kind of
13 rendered by the advertising profession onto their
14 own?
15 A. No, I don't.
16 Q. And you don't think politics play any part in
17 that?
18 A. No.
19 Q. You don't think politics play any role in the
20 Academy Awards either, do you?
21 A. I wouldn't say that.
22 Q. Basically the kind of information you get is
23 whatever information the people want to submit to
24 you, correct, for the EFFIE awards?
25 A. The information we get is the information they
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1 submit.

2 Q. So the people who have designed the ad campaigns
3 control the information you ultimately see?

4 A. Sometimes it's the client, sometimes it's the
5 agencies, but, yes.

6 Q. The client would ultimately have to approve the
7 agency getting out the information because that's
8 usually considered sensitive; is that right?

9 A. That's right.

10 Q. In any event, the people applying for the award
11 are the people who actually control the information
12 you review, correct?

13 A. They send it, yes.

14 Q. And so you see whatever selected information
15 they want you to see, correct?

16 A. That's correct.

17 Q. They don't open up their files and let you just
18 go rummaging through, right?

19 A. That's correct.

20 Q. What other ad campaigns have you helped design?
21 Are there any others other than the ones we have
22 already discussed?

23 A. Not that I recall, no.

24 Q. And you've never done any formal research on the
25 effect of cigarette marketing or advertising,

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1 correct?
2 A. Correct. By formal research you mean conducted
3 studies?
4 Q. Yes, actually did research yourself. The
5 research you've done is basically relying on other
6 people's research, correct?
7 A. Yes.
8 Q. You've done no actual survey or experimental
9 research on cigarette advertising or marketing,
10 correct?
11 A. Aside from the piece that you were given today.
12 The censorship study does talk about cigarettes.
13 Q. That's the only piece?
14 A. Yes, to the best of my recollection.
15 Q. Did you receive any grant money to do this
16 article on censorship?
17 A. Yes.
18 Q. Who?
19 A. The American Academy of Advertising.
20 Q. People who are basically in favor of
21 advertising, correct?
22 A. No.
23 Q. Who are the members of the National Association
24 of --
25 A. American Academy of Advertising.
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- 1 Q. Who are the members?
2 A. Predominantly academics that teach advertising.
3 Q. But not exclusively?
4 A. Not exclusively.
5 Q. Who else are members?
6 A. I believe there is a couple members from
7 industry.
8 Q. How does that board get its funding? Do
9 academics pitch in?
10 A. We pay dues.
11 Q. Are those dues then are used to fund studies
12 such as the one that you did?
13 A. Some small amount of that is done for a
14 competitive grant process.
15 Q. Do you know where the money from your study came
16 from? Did it come from the dues paid by the National
17 Academy of Advertising --
18 A. American Academy of Advertising.
19 Q. Let me write that down so I've got it.
20 A. There are a couple different sources in which
21 the Academy receives income.
22 Q. How else does the Academy receive income from?
23 You said dues.
24 A. Right. Some from its conference although
25 generally that just goes to pay for the conference.

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- 1 Q. What else?
2 A. There is some money that comes in to
3 subscriptions to the Journal of Advertising.
4 Q. Any other money?
5 A. By in large that's it.
6 Q. Do they receive any grant money?
7 A. The Academy?
8 Q. Yes.
9 A. No.
10 Q. Do they ever receive donations from
11 corporations?
12 A. Not to the best of my knowledge.
13 Q. But you're not certain?
14 A. Ever, no, I'm not certain ever.
15 Q. The American Academy of Advertising is basically
16 made of people with a vested interest in advertising,
17 right?
18 A. People who have an interest in teaching and
19 advertising.
20 Q. They make their living off of that, correct?
21 A. We make our livings teaching education.
22 Q. But you teach about advertising, right?
23 A. Some.
24 Q. If advertising disappears tomorrow you probably
25 wouldn't have a whole lot to teach about, right?

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- 1 A. Not necessarily.
2 Q. And you've also made other money concerning
3 advertising and consulting advertising; is that
4 correct?
5 A. That's correct.
6 Q. So you have a vested interest in advertising,
7 correct?
8 A. In that sense.
9 Q. You've made it your career, haven't you?
10 A. I've made it a topic of study.
11 Q. And of course you could have picked other topics
12 of study.
13 A. Correct.
14 Q. But you picked advertising.
15 A. Correct.
16 Q. Do you generally believe that big advertising
17 agencies and marketing agencies have a great deal of
18 expertise in advertising?
19 A. I'm not quite sure what a great deal of
20 expertise would be.
21 Q. Well, they're usually paid by people to do
22 advertising, correct?
23 A. That's correct.
24 Q. Often vast sums of money, correct?
25 A. That's correct.

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- 1 Q. Apparently at least the marketplace would have
2 deemed that they had some place in advertising,
3 correct?
4 A. I would assume.
5 Q. Usually corporations don't spend millions and
6 billions of dollars for products they don't consider
7 to be worthwhile, correct?
8 A. I would consider that to be true.
9 Q. You also understand that most major corporations
10 have big marketing and advertising departments,
11 right?
12 A. They have departments. They're varying in size.
13 Q. You would assume that there is a fair amount of
14 expertise that resides in those departments, correct?
15 A. There is some.
16 Q. At least as far as implementing advertising and
17 designing effective advertising they probably have
18 more expertise than you, correct?
19 A. I'm sure they have different forms of expertise.
20 Q. And their expertise would actually be commercial
21 advertising; that is formulating campaigns to sell
22 products and deciding whether or not those campaigns
23 did, in fact, sell those products, correct?
24 A. They would be in different areas of trying to
25 sell brands.

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1 Q. Well, they might also be trying to sell
2 products, correct?

3 A. No. I think they would perceive themselves to
4 be in the business of selling brands.

5 Q. But again, you don't know because you've never
6 looked at their documents, right?

7 A. No. The people I've talked to have perceived to
8 sell brands.

9 Q. You never talked to people in the advertising in
10 the cigarette industry, have you?

11 A. No.

12 Q. So you're going to testify at trial that
13 cigarette advertising is brand advertising and yet
14 you've never spoken to one person in a marketing
15 department in a cigarette company, correct?

16 A. What I anticipate testifying at trial is that
17 cigarette advertising may have an impact on brands,
18 but not on products.

19 MR. O'FALLON: I'm going to move to
20 strike as non-responsive. Why don't I restate my
21 question. Would you read it back?
22 (Record read.)

23 THE WITNESS: It seems to be two
24 separate questions. Can we break it down?

25 BY MR. O'FALLON:

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1 Q. No.
2 A. I don't know how to respond to it.
3 Q. You've never spoken to anybody in a marketing or
4 advertising department of the cigarette company; is
5 that correct, sir?
6 A. To the best of my knowledge, that's correct.
7 Q. You've never asked anybody, any marketing or
8 advertising department of a cigarette manufacturer,
9 whether they're advertising brand advertising,
10 correct?
11 A. I've never asked that question, no.
12 Q. You haven't went through and assessed all the
13 advertising done by the cigarette manufacturers,
14 correct?
15 A. That's correct.
16 Q. Have you looked at any advertising other than
17 the advertising that's identified in your attachments
18 to your expert report?
19 A. Yes.
20 Q. What other advertising have you looked at?
21 A. Other assorted ads. I'm not sure.
22 Q. Have you collected those?
23 A. I'm sure at some point in time I may have begun
24 a collection. Not in a regular way.
25 Q. You haven't -- you haven't done it in any
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1 methodical or organized fashion?

2 A. That's correct.

3 Q. So at best it was a sporadic half hazard
4 collection of it from the cigarette industry, correct?

5 MR. PURVIS: Object to the form.

6 THE WITNESS: It was a small
7 collection of ads that I came across.

8 BY MR. O'FALLON:

9 Q. What would be the total amount of ads?

10 A. I don't know.

11 Q. Less than a hundred?

12 A. Probably.

13 Q. More than ten?

14 A. Probably.

15 Q. Twenty-five?

16 A. Could be.

17 Q. But you don't have those any more?

18 A. No. These were just things I've looked at over
19 time.

20 Q. Over what period of time?

21 A. Time since I've been involved in this. Probably
22 from 1994 on I would say.

23 Q. So in the last three years, from 1994 to the
24 present, you've sporadically looked at somewhere
25 between ten, but less than a hundred cigarette

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1 advertisements?

2 MR. PURVIS: Object to the form.

3 THE WITNESS: During that time I've
4 looked at about that number of ads.

5 BY MR. O'FALLON:

6 Q. But you haven't done any methodical assessment
7 of those ads, correct?

8 A. That's correct.

9 Q. You haven't sat down and tried to figure out
10 every place those ads ran, correct?

11 A. That's correct.

12 Q. You haven't sat down and looked at those ads
13 over time, correct?

14 A. No.

15 Q. You haven't sat down and compared one group of
16 cigarette ads with another group of cigarette ads,
17 correct?

18 A. No.

19 Q. At most you've taken this small collection of
20 cigarette advertising and compared it to advertising
21 for other products, correct?

22 A. Correct.

23 Q. Were you even consistent in making sure that the
24 ads you collected all came from the same magazine or
25 the same month or any such fashion?

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1 A. No.
2 Q. Did you impose any control? It sounds to me
3 like when I characterize your collection of ads as
4 half hazard, in fact, was that.
5 MR. PURVIS: Object to the form.
6 BY MR. O'FALLON:
7 Q. Would you agree with that characterization?
8 A. I wouldn't necessarily use that term.
9 Q. Is that a rough equivalent of what you did?
10 MR. PURVIS: Object to the form.
11 THE WITNESS: I looked at ads that I
12 came cross.
13 BY MR. O'FALLON:
14 Q. Just whenever you happened to come across them,
15 right?
16 A. As I came across them, yes.
17 Q. But you didn't set out to find ads or anything?
18 A. I did not go searching for them if that's what
19 you're asking.
20 Q. So if the ads came to you in the form of
21 something you happened to be reading you might cut it
22 out or tear it out, right?
23 A. Correct.
24 Q. But again, there was no formula or structure to
25 the way in which you collected the ads, correct?
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1 A. Correct.
2 Q. Sir, do you believe it's important for
3 industries in their advertising to tell the truth?
4 A. Well, we're going to probably have to define
5 truth.
6 Q. Why don't you tell me what your definition of
7 truth is.
8 A. There are many and I don't know that I have one.
9 There is an area in advertising that is PUFFERY that
10 is distinct from truth or falsity.
11 Q. PUFFERY is kind of like little white lies,
12 correct?
13 MR. PURVIS: Object to the form.
14 THE WITNESS: I think it's defined in
15 different ways.
16 BY MR. O'FALLON:
17 Q. Would little white lies be one definition you
18 would use?
19 A. Probably not.
20 Q. How would you define PUFFERY?
21 A. I would probably define it as statements that
22 are obvious and recognized exaggerations or --
23 Q. Of course whether or not something is an obvious
24 recognized Exaggeration depends on the level of
25 knowledge of the consumer, correct?

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1 A. That's one of the things that it might depend
2 on.
3 Q. You would agree that an advertiser should not
4 make misleading statements, correct?
5 A. I would agree that advertisers probably -- well,
6 should not make knowingly misleading statements.
7 Q. What about statements that are misleading based
8 on what that manufacturer or advertiser has in their
9 own files?
10 A. I'm sorry. I'm not following that question.
11 Q. What if an advertiser has information in its own
12 files, for instance, that cigarette smoking is
13 dangerous and yet persists in insisting that it's not
14 dangerous? Would you call that misleading?
15 MR. PURVIS: Object to the form.
16 THE WITNESS: Hard to say.
17 BY MR. O'FALLON:
18 Q. I'm asking.
19 A. It depends what is in their files, where it came
20 from. It's a very difficult question to answer just
21 based on that.
22 Q. Do you think that it's misleading for a product
23 to state that it has a health benefit when, in fact,
24 it is well known that it does not have a health
25 benefit?

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1 A. Is it misleading?
2 Q. Yes.
3 A. To state that it does and it's well known that
4 it doesn't?
5 Q. Well, known by the manufacturer.
6 A. It could be.
7 Q. For instance, would it be misleading for a
8 company to say that a product is - quote - a low tar
9 product - when the company actually knows that the
10 smoker will not get lower tar than they would with
11 their regular products?
12 A. Depends how it's in reference to and it's
13 stated. Low compared to what?
14 Q. Well, if you saw an ad that says this is a low
15 tar cigarette what would you assume?
16 A. I guess I would assume that it is a cigarette
17 that's low in tar.
18 Q. That you would actually as a smoker receive less
19 tar than you would with a regular cigarette, correct?
20 A. Some other cigarettes, yes.
21 Q. Cigarettes that aren't advertised as low tar
22 cigarettes, correct?
23 A. Possibly.
24 Q. You would agree it would be misleading to state
25 that a cigarette is low tar when, in fact, a company

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1 knows that an individual smoker will probably get the
2 same amount of tar from that cigarette as they would
3 from a full flavor cigarette because the way in which
4 they smoke the cigarette, correct?

5 MR. PURVIS: Object to form.

6 THE WITNESS: Could you say that
7 again?

8 BY MR. O'FALLON:

9 Q. Would you agree that it would be misleading for
10 a company to advertise a cigarette as low tar when,
11 in fact, the company knows that the smoker will get
12 as much tar from a low tar cigarette as it does from
13 it's non low tar cigarettes?

14 MR. PURVIS: Object to form.

15 THE WITNESS: That's a hard question
16 to answer.

17 BY MR. O'FALLON:

18 Q. Why?

19 A. Because there is not sufficient information
20 about it.

21 Q. Well, I've asked you to assume that the company
22 has said that its cigarette is a low tar cigarette.

23 I've also asked you to assume that the company
24 has evidence that, in fact, the amount of tar an
25 individual smoker will receive in that cigarette is

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1 not going to be a whole lot different than the amount
2 of tar they would receive from a regular cigarette
3 because the company knows they will adjust their
4 smoking ad for the low tar cigarette. Given that
5 wouldn't you agree it would be misleading to
6 advertise as low tar?
7 A. My understanding is you've changed the question
8 so let me try and clarify for my own mind. Is it
9 their own brand regular cigarette or any regular
10 cigarette?
11 Q. What if they don't specify? They just say it's
12 a low tar cigarette or the lowest in tar?
13 A. If it's they say it's the lowest in tar?
14 Q. Sure.
15 A. And there is evidence what? I'm sorry.
16 Q. And there is evidence that they know, in fact,
17 the cigarette smoker is going to get as much tar from
18 that cigarette as it would from the cigarettes that
19 are considered or marketed as non low tar cigarettes.
20 A. The cigarette itself could still be low tar as
21 I'm understanding your question and therefore not
22 necessarily be misleading in its statement.
23 Q. If the company knows that the smoker is going to
24 get the same amount of tar from that - quote -
25 unquote - low tar cigarette as it does from the non

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1 low tar cigarettes wouldn't that be misleading?

2 MR. PURVIS: Object to the form.

3 THE WITNESS: It's possible you would
4 have to do research to determine whether or not it
5 was misleading, but I could see ways in which it
6 could be an inaccurate statement.

7 BY MR. O'FALLON:

8 Q. What if the research is in your own files? Why
9 would you have to? Don't you agree a manufacturer or
10 advertiser has to make sure its statements are true
11 before it puts it out?

12 MR. PURVIS: Object to the form.

13 THE WITNESS: I would think they
14 would want to make sure its statements are accurate.

15 BY MR. O'FALLON:

16 Q. For instance, an advertiser would want to have
17 evidence that, in fact, what it's saying about its
18 products was true, correct?

19 A. I'm sorry?

20 Q. For instance, an advertiser would want to have
21 evidence supporting its statements before it made
22 statements about its product, correct?

23 A. It might.

24 Q. What do you mean it might?

25 A. It might.

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1 Q. Wouldn't you require that? Don't you think that
2 should be required?

3 MR. PURVIS: Object to the form.

4 THE WITNESS: Personal opinion?

5 BY MR. O'FALLON:

6 Q. Yes.

7 A. It would be a good idea.

8 Q. Don't you think it's required by ethics?

9 A. I believe it would be a good idea.

10 Q. But you don't believe it's required?

11 A. If you have no reason to question that I don't
12 see any reason to do it.

13 Q. If someone told you that they had a product that
14 would grow hair on your head and you bought it
15 expecting to grow hair on your head, and the fact of
16 the matter is they had absolutely no evidence in
17 their own files to indicate that that product would
18 ever grow one piece of hair on your head wouldn't you
19 consider that misleading?

20 MR. PURVIS: Object to the form.

21 THE WITNESS: Could you restate that?

22 MR. O'FALLON: Why don't you read it
23 back for him.

24 (Record read.)

25 THE WITNESS: Depends on what their
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1 belief system was.
 2 BY MR. O'FALLON:
 3 Q. So from your point of view it's a subject as
 4 opposed to an object of standard?
 5 A. I think there are times when one would assume
 6 they have reason to believe their product works, that
 7 it would not make sense to necessarily look at
 8 research.
 9 Q. Don't you think they should have some evidence
 10 that their product works to do the specific thing
 11 they're saying it does before they put it on the
 12 market?
 13 A. I assume those do.
 14 Q. Do you think it's a requirement?
 15 A. Again, it depends on the situation.
 16 Q. So there are situations in which you think it's
 17 okay for a manufacturer to say, hey, my product does
 18 X when, in fact, they have absolutely no indication
 19 or evidence that their product does X?
 20 MR. PURVIS: Object to the form.
 21 THE WITNESS: I think they need some
 22 reason to believe that it does, some belief.
 23 BY MR. O'FALLON:
 24 Q. And that's all you think a person has to have;
 25 as long as they have some belief, regardless of how
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1 unreasonable that belief may be, that that's enough
2 for you?

3 A. I believe that if they have belief for this and
4 there is no reason to doubt it and they did research
5 then it's not necessarily an effort to mislead if I'm
6 understanding the question.

7 Q. So you're okay with advertisers making
8 unsubstantiated claims?

9 MR. PURVIS: Object to the form.

10 THE WITNESS: No.

11 BY MR. O'FALLON:

12 Q. You would only oppose claims being made if an
13 advertiser actually had information that directly
14 contradicted what they were saying, correct?

15 A. I'm sorry?

16 Q. You would only oppose advertisers making claims
17 if they have evidence that directly contradicts what
18 they're saying?

19 MR. PURVIS: Object to the form.

20 THE WITNESS: I would only classify
21 it as -- well, we have kind of switched from
22 classified misleading to whether I would -- I'm
23 sorry. Whatever your term was. Could you read it
24 again to me?

25 (Record read.)

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1 THE WITNESS: I would think in that
2 case there would certainly be a problem.

3 BY MR. O'FALLON:

4 Q. But you think it's okay for an advertiser to
5 make an unsubstantiated claim?

6 MR. PURVIS: Object to the form.

7 THE WITNESS: In some situations
8 where they have reason to believe that it's true. I
9 can see that they would make claims that have not
10 been tested by research, depending on the claim.

11 BY MR. O'FALLON:

12 Q. Do you understand that part of the cause of
13 action that we have brought in this case involve
14 violations of the Consumer Protection statutes in
15 this state?

16 A. I'm not sure that I fully understand the
17 implications of that.

18 Q. Are you planning to give any testimony at trial
19 that cigarette advertising is truthful?

20 A. What do you mean by truthful? Again, we get
21 into what does that involve.

22 Q. You don't have a clear definition of truth in
23 your own mind?

24 A. My view is that what I plan to testify is
25 regarding how people perceive the advertising.

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1 Q. So you're not going to be testifying as to
2 whether or not individual cigarette ads violate the
3 Consumer Protection Statutes in this state, correct?

4 A. To fully answer that I would probably need to
5 take a look at what the Consumer Protection Statutes
6 are.

7 Q. I'm trying to figure out whether or not your
8 opinions are going to encompass whether or not
9 cigarette advertising violates our Consumer
10 Protection Statute.

11 Is it true you haven't been asked to look at
12 that issue so far?

13 A. Not in those words. I don't know what is
14 included in that statute so I can't give you a
15 complete, accurate answer.

16 Q. So I guess if you don't know what's included in
17 those statutes it's going to be pretty hard to
18 testify, right?

19 MR. PURVIS: Object to the form.

20 THE WITNESS: I would not be able to
21 answer the question you just posed.

22 BY MR. O'FALLON:

23 Q. Do you intend to testify at trial as to whether
24 any cigarette advertising is misleading?

25 A. I expect to talk about how people perceive the
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1 ads.

2 MR. O'FALLON: Move to strike as
3 non-responsive.

4 BY MR. O'FALLON:

5 Q. Do you expect to testify as to whether the ads
6 themselves are misleading?

7 A. Misleading in what way?

8 Q. Misleading -- in misleading the consumer.

9 A. I expect to talk about the relative views of --
10 the relative impact or likely impact or content of
11 the cigarette ads relative to other similar -- or
12 other similar ads.

13 Q. But you're not going to be talking about whether
14 the cigarette advertising and what they say are, in
15 fact, truthful statements, correct?

16 A. As I understand that, no.

17 Q. Because to understand whether they're truthful
18 or not you would actually have to look at an internal
19 company document to see what the company knew, right?

20 A. No.

21 MR. PURVIS: Object to the form.

22 BY MR. O'FALLON:

23 Q. Do you think you can testify as to whether a
24 statement is true or untrue irrespective of what the
25 company actually knew at the time he made the

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1 statements?
2 A. Yes.
3 Q. Do you think you can testify that an ad is --
4 A. I'm sorry. Not that I would testify, but
5 someone could.
6 Q. I'm not deposing someone, sir, I'm deposing you.
7 A. I'm sorry. Then I may have answered you because
8 that's how I interpreted it.
9 Q. You understand we're here to get your expert
10 witness opinions, right?
11 A. I understand.
12 Q. Is there any doubt about that in your mind?
13 A. No.
14 Q. So again, my question is, are you going to be
15 analyzing ads made by the cigarette companies on
16 whether or not they are truthful or not?
17 A. Not to answer that direct question.
18 Q. Are you going to be analyzing cigarette ads to
19 determine whether or not they contain misleading
20 statements?
21 A. No, not directly.
22 Q. Are you going to do that indirectly?
23 A. Again, that partly depends how we treat these
24 terms.
25 Q. Well, how do you indirectly analyze whether or
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1 not a statement is misleading?
2 A. You look at what beliefs people have from the
3 statement.
4 Q. And compare it to what?
5 A. Beliefs they might have about other statements
6 or ads.
7 Q. Why?
8 A. To determine whether a specific ad was any more
9 or less misleading or any more or less able to
10 project meaning.
11 Q. Well, you know if you look at twenty ads and
12 they're all misleading that's not going to pull one
13 out.
14 You're not saying if you look at one ad and
15 compare it to twenty other misleading ads that that
16 makes the one ad any less misleading, right?
17 A. Correct.
18 Q. A statement is either misleading or it's not
19 misleading, right? It's not really a compared type
20 thing, right?
21 A. Since there is difficulty of determining what
22 objectively is true, it is a comparative thing.
23 Q. Again, we come back to the whole notion of you
24 have a difficult time actually opining on what is
25 true, right?

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1 MR. PURVIS: Object to the form.

2 THE WITNESS: In relation to any given
3 statement that may well be true.

4 BY MR. O'FALLON:

5 Q. Are you familiar with the term expressly false?

6 A. No, I don't believe I am.

7 Q. Are you familiar with an advertising term in
8 which advertising is deemed to be expressly false?

9 A. I'm sorry. Would you repeat the question?

10 Q. Are you familiar with advertising terms in which
11 advertising is deemed to be expressly false?

12 A. I'm sorry. I really don't understand the
13 question.

14 Q. How about impliably false, have you ever heard
15 that term?

16 A. I believe I've heard it.

17 Q. What does that mean to you?

18 A. I'm not sure.

19 Q. Well, what did you understand it to mean when
20 you heard it?

21 A. That perhaps my understanding might have been
22 that it was -- was that it was created misperception.

23 Q. Have you ever asked to analyze advertising to
24 determine whether it is either expressly false or
25 impliably false?

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- 1 A. Not directly, no, not in those terms.
2 Q. No one's ever asked you to do that?
3 A. No.
4 Q. You've never been involved in mediations or
5 cases in which there was allegations made that
6 advertising was false and you were called upon to
7 determine whether the advertising was, in fact,
8 false?
9 A. No.
10 Q. You would agree that when an advertiser puts out
11 an ad or a statement that the advertiser expects
12 people to hear that statement, correct?
13 A. Certainly they hope that will be the case.
14 Q. And they also hope that people will rely on that
15 statement, correct?
16 A. They hope the ad will be effected.
17 Q. And in order to be effected they hope to rely on
18 statements made in the ad?
19 A. They hope.
20 Q. And certainly people would react based upon
21 those advertising statements, correct?
22 A. Yes.
23 Q. Specifically they hope people will buy their
24 product, correct?
25 A. They hope they buy their brand, yes.

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- 1 Q. So in other words, when an advertiser makes a
2 claim, the advertiser is expecting a certain level of
3 reliance on that claim, correct?
4 A. Yes.
5 Q. Would you agree that it's reasonable for
6 individuals to rely on advertising?
7 A. Not solely.
8 Q. But it's at least reasonable to rely on the
9 advertising to the extent that the advertising is
10 providing information, correct?
11 A. To some degree and in some situations. It's not
12 a yes or no kind of answer.
13 Q. When an advertiser makes a statement you would
14 agree that it's reasonable for them to expect that
15 people will rely on their statements, correct?
16 A. Not necessarily.
17 Q. In fact, they are attempting to induce that
18 reliance, aren't they?
19 A. That may be one thing they sometimes do, but
20 it's not always what they try to do.
21 Q. You don't think most advertisers when they make
22 public statements hope that you will not only rely on
23 those statements, but will be moved to action on
24 those statements?
25 A. I think often times, but not always.

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1 Q. What are some examples of when that isn't true?

2 A. I think irony, humor, all those elements in
3 advertising that are examples where people -- where
4 the advertiser does not expect literal truth.

5 Q. But again, what the advertiser is trying to
6 create is a perception that will hopefully convince
7 that person who will view their products positive,
8 correct?

9 A. Yes. They try to create a perception of brands.

10 Q. They try to create a positive perception of the
11 products they're advertising, correct?

12 A. Sometimes. That's one technique.

13 Q. Wouldn't you agree that the ultimate goal of
14 advertising is to convince the public that whatever
15 is being sold is something they should want to buy?

16 A. I'm sorry. Could you repeat that.

17 MR. O'FALLON: Would you please read
18 it?

19 (Record read.)

20 THE WITNESS: There are a lot of
21 reasons in which advertising is used. That may be
22 one in regard to brands.

23 BY MR. O'FALLON:

24 Q. Can you answer any question that I give you
25 without using the word brands?

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1 MR. PURVIS: I object.
 2 THE WITNESS: Yes.
 3 BY MR. O'FALLON:
 4 Q. You only think brand advertising tries to create
 5 a positive perception of a product, correct?
 6 A. By in large I think that's typically the case.
 7 Q. You don't think the primary advertising such as
 8 the orange juice advertising is trying to create a
 9 positive perception of orange juice?
 10 A. I think in that case it is.
 11 Q. And also the other examples you gave me, I
 12 believe milk, you would agree they were trying to
 13 create a positive perception of milk?
 14 A. Correct.
 15 Q. But not computers?
 16 A. Not at this point in time.
 17 Q. At what point in time was that true?
 18 A. Perhaps there was more concern about that when
 19 they were first introduced.
 20 Q. How long does a product have to be introduced
 21 before you consider that product to be a mature
 22 product where only brand advertising takes place?
 23 A. There is no single period that one could use.
 24 Q. Well, what's your criteria for a mature market?
 25 A. Generally I would consider a mature product
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1 category to occur when it's been well established in
2 people's minds.
3 Q. That's it?
4 A. Well, there are other characteristics.
5 Q. Like what?
6 A. Typically growth in sales begin to level off.
7 Q. What else?
8 A. As I think of it, those are the things that come
9 to the top of my mind.
10 Q. So it's your testimony for computers the growth
11 and sales have now leveled off?
12 A. In terms of new users, yeah.
13 Q. Why does it have to be new users? When did that
14 come in?
15 A. I would say that -- well, I would say that right
16 now the growth of sales in computers has leveled off.
17 Q. You said in terms of new users. Why did you
18 throw that in?
19 A. I'm making it more general now.
20 Q. So it's going to be your testimony that growth
21 in computers has now leveled off?
22 A. To the best of my knowledge.
23 Q. When did it level off?
24 A. I don't know.
25 Q. When did you consider computers to be in the
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1 mature market?

2 A. Again, computers are not a single product and so
3 you're going to have to partly depend on what kind of
4 computer and what kind of situation. I would look at
5 it as being different products.

6 Q. Well, they all perform somewhat the same
7 function, don't they?

8 A. True, but they also do perform some differences.

9 Q. How about the personal computer market, when
10 did the personal computer market become a mature
11 market?

12 A. I couldn't give you a date. I don't know.

13 Q. I take it you were using the personal computer
14 market, but maybe I'm wrong. You used Compaq, Dell
15 and IBM. Were you thinking of the personal computer
16 market there?

17 A. Let me look.

18 Q. It doesn't really say much more than what I told
19 you.

20 A. I would like to take a look if you don't mind.
21 My interpretation of what it says there is simply
22 that these are examples of different brands and brand
23 choice, and that that's an example of secondary
24 demand, making a brand decision.

25 Q. But secondary brand occurs in a mature market;

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1 isn't that your testimony?

2 A. Any kind of market.

3 Q. Does primary demand occur in a mature market?

4 A. By in large, no.

5 Q. So what you were trying to say is this is an
6 example of secondary demand. Were you also trying to
7 convey that this is a market in which there is no
8 primary demand?

9 A. I was simply trying to convey for they and
10 there. I'm sorry for the confusion.

11 Q. I'm not confused.

12 A. That I simply meant that these are examples of
13 different brands.

14 Q. But I think you've also testified today that the
15 advertising that was done by those advertisers was
16 solely brand advertising, correct?

17 A. I don't recall exactly what I had said.

18 Q. Assuming you did say that then that would also
19 be your understanding that that would be a mature
20 market, right?

21 MR. PURVIS: Object to the form.

22 THE WITNESS: I would believe that
23 those brands are trying to influence brand choice and
24 those are trying to get people to make brand choices.

25 BY MR. O'FALLON:

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- 1 Q. And it was your understanding that that would be
2 the sole purpose of that advertising, correct?
3 A. I believe I said that was the primary purpose,
4 but I don't recall the exact words.
5 Q. So it would indicate that you would then also be
6 testifying as a necessarily corollary that that
7 market, whatever that market was, was a mature
8 market, correct?
9 A. I'm sorry. I'm confused. Based on the
10 statements that are in the --
11 Q. And your previous testimony here today, sir.
12 A. Okay.
13 Q. Brand advertising -- advertising that is solely
14 brand advertising only occurs in the mature market,
15 correct?
16 A. No.
17 Q. Solely. Do you understand the word solely?
18 A. Yes.
19 Q. So you're saying that --
20 A. I'm sorry.
21 Q. -- even in an immature --
22 A. I'm sorry.
23 Q. Can you understand my question now?
24 A. Yes.
25 Q. A market in which there is solely brand

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1 advertising would be by your definition a mature
2 market, correct?

3 A. I would not use that as a definitional category,
4 but it is most likely that would be the case.

5 MR. O'FALLON: I need to take about
6 four minutes.

7 (Recess taken.)

8 BY MR. O'FALLON:

9 Q. Sir, are you familiar with the term marketing
10 mix?

11 A. Yes.

12 Q. How would you define that term?

13 A. It's the combination of different elements one
14 uses in marketing.

15 Q. Would you agree that public statements made by a
16 company would be part of the marketing mix?

17 A. It could be thought of that.

18 Q. I'd like to speak specifically about statements
19 made by the tobacco industry about their products.

20 Are you familiar with the various statements made
21 by the tobacco industry about their products?

22 A. Not all.

23 Q. Are you familiar with the industry stance that
24 there is -- that it has not been proven that smoking
25 causes any disease?

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1 MR. PURVIS: Object to the form.
 2 THE WITNESS: I've heard and read news
 3 accounts.
 4 BY MR. O'FALLON:
 5 Q. Is that your understanding of their public
 6 stance concerning smoking and health?
 7 A. I'm not sure exactly what their public stance
 8 refers to.
 9 Q. Their publicly stated stance, sir.
 10 A. What that is at this moment, I don't know.
 11 Q. You haven't done any research into that?
 12 A. No.
 13 Q. You haven't bothered to look?
 14 A. No.
 15 MR. PURVIS: Object to the form.
 16 BY MR. O'FALLON:
 17 Q. You would agree that statements they make about
 18 the dangers of their own products would be part of
 19 the marketing mix, correct?
 20 A. I would not perceive it as such that it was part
 21 of a marketing mix.
 22 Q. You would agree that statements a manufacturer
 23 makes about its own products and the dangers of its
 24 own products would have an effect on how the public
 25 would perceive the product potentially, correct?
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1 A. Possible, but hard to say.
 2 Q. You've not evaluated that?
 3 A. I evaluated issues related to that.
 4 Q. Would you agree that the manufacturer of a
 5 product is kind of the final word about the safety of
 6 a product?
 7 A. No.
 8 Q. Let's put in this essential: If a manufacturer
 9 is willing to concede its product as dangerous, that
 10 really eliminates any doubts about whether or not the
 11 product is dangerous, correct?
 12 A. No.
 13 Q. Presumably the manufacturer is the person with
 14 the greatest incentive not to overly publicize the
 15 dangers, correct?
 16 A. That's true.
 17 Q. So if the manufacturer concedes that its product
 18 is, in fact, dangerous, at that point to a large
 19 extent there would be debates over about whether or
 20 not that product is dangerous, correct?
 21 MR. PURVIS: Object to form.
 22 THE WITNESS: I'm not sure whether it
 23 would be true or not.
 24 BY MR. O'FALLON:
 25 Q. It would make a fair amount of sense, wouldn't
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1 it, at least in the consumer's mind if the
2 manufacturer is willing to concede that the product
3 is dangerous?

4 A. Depends on the situation.

5 Q. How about with cigarettes? If the manufacturers
6 came out tomorrow and said we can see that cigarette
7 smoking causes disease, do you think that by in large
8 the public would believe that?

9 A. By in large the public would believe that.

10 Q. However you would agree that at least certain
11 people will latch on to statements made by the
12 industry that there is a doubt about whether their
13 products cause disease in order to continue to
14 purchasing that product, correct?

15 MR. PURVIS: Object to the form.

16 THE WITNESS: I don't know if they do
17 or don't.

18 BY MR. O'FALLON:

19 Q. At least it's reasonable to believe some people
20 are going to adopt the stance the industry has taken
21 towards medical causation if the industry keeps
22 repeating over and over again that there has been no
23 scientific proof that smoking causes any disease,
24 correct?

25 A. I'm sorry. Could you repeat the question?

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1 MR. O'FALLON: Read it.

2 (Record read.)

3 THE WITNESS: One more time.

4 MR. PURVIS: I'll object to the form.

5 (Record read.)

6 THE WITNESS: I believe that people
7 may accept that stance.

8 BY MR. O'FALLON:

9 Q. You would also agree that if the industry
10 continues to contend that cigarette smoke is
11 something not addictive, that people will also accept
12 that stance, correct?

13 A. I think by in large people have -- well, people
14 have not accepted that stance.

15 Q. At least in part the refusal of people to accept
16 that stance may be based upon the industry's public
17 statements that their product is not addictive,
18 correct?

19 A. I'm not sure why people do. There certainly are
20 going to be many factors.

21 Q. I said it would be reasonable for people to
22 adopt the industry stance that smoking is not
23 addictive especially in light of the fact that the
24 cigarette industry continues to perpetuate that
25 notion, correct?

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1 MR. PURVIS: Object to the form.

2 THE WITNESS: I don't think that's the
3 primary reason people would hold that position.

4 BY MR. O'FALLON:

5 Q. But it would be one reason, correct?

6 A. Without looking at evidence I couldn't rule it
7 out, but I don't know.

8 Q. It could be a substantial factor in why they
9 continue to believe that smoking is not addictive,
10 correct?

11 A. I would tend to doubt it, but I don't know. I
12 couldn't --

13 Q. You've never studied that issue?

14 A. No.

15 Q. Have you ever studied the marketing or
16 advertising of an addictive product?

17 A. Can we talk about what you mean by study?

18 Q. What's vague about that, sir?

19 A. Read about it?

20 Q. Study.

21 A. Formal research, look at literature?

22 Q. Why don't we just talk about study for a second.
23 Have you ever studied an addictive product?

24 A. Study to mean means a lot of different things.

25 I'm not quite sure how you're trying to use it here.

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1 Q. Have you ever conducted research on addictive
2 products?
3 A. No.
4 Q. What were your other definitions of study?
5 A. Read about, examine.
6 Q. How about examine, have you ever examined
7 addictive products?
8 A. I don't know if I would use examine much the way
9 I read about, look at the literature.
10 Q. In a formalized or informal way. I read today's
11 newspaper, but I wouldn't call that a study. Would
12 you call that a study?
13 A. No, I would not.
14 Q. I read Time magazine. I don't consider that a
15 study. Do you consider that a study?
16 A. No, I don't.
17 Q. My wife gets the Home Journal and I occasionally
18 read that. I don't consider that a study. Do you
19 consider that a study?
20 A. I do not.
21 Q. You would consider a study where you actually
22 sit down and go about educating yourself about a
23 subject matter, correct?
24 A. Correct.
25 Q. So it would be a purposeful matter other than a
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1 half hazard way?
2 A. Correct.
3 Q. Defining study in that fashion have you ever
4 studied addictive products?
5 A. No.
6 Q. Have you ever studied marketing of addictive
7 products?
8 A. No.
9 Q. Do you think that the fact that a product is
10 addictive would change in some fashion the approach
11 that an advertiser would take to that product?
12 A. Approach in what way?
13 Q. In how they advertise.
14 A. Possibly.
15 Q. It should be a little bit easier to convince
16 somebody to keep using that product if it's
17 addictive, right?
18 A. I suppose it might. I don't know.
19 Q. Have you ever studied advertising relating to
20 deadly products previously?
21 MR. PURVIS: Object to the form.
22 THE WITNESS: I can't recall studying
23 advertising of any deadly products.
24 BY MR. O'FALLON:
25 Q. Do you agree that cigarettes are a deadly
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- 1 product?
- 2 A. I don't know.
- 3 Q. You have no opinion one way or the other?
- 4 A. I have personal opinions.
- 5 Q. What's your personal opinion?
- 6 A. That it may be one of many factors that can
- 7 contribute to health problems.
- 8 Q. Do you believe it's more likely than not that
- 9 cigarette smoking causes disease?
- 10 A. In some people sometimes.
- 11 Q. How about in the general population?
- 12 A. Some of them.
- 13 Q. How many?
- 14 A. I don't know.
- 15 Q. If the cigarette manufacturers, in fact, have
- 16 information that would lead them to believe, and they
- 17 have, in fact, concluded that cigarette smoking does
- 18 cause disease do you agree it would be misleading for
- 19 them to say otherwise publicly?
- 20 A. If they had come to the conclusion that it did
- 21 and said otherwise, yes.
- 22 Q. If the cigarette manufacturers or a cigarette
- 23 manufacturer believed that cigarette smoking was
- 24 addictive and yet stated publicly that it was not
- 25 would you agree that that would be misleading?

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1 A. Could be.
2 Q. Could be or is?
3 A. Well, whether it is or not would depend on
4 whether people would be -- were misled by it, so --
5 Q. Wasn't it your earlier testimony that people
6 believe that cigarette smoking is not addictive?
7 A. I don't recall that.
8 Q. Do you believe cigarette smoking is addictive?
9 A. I'm not a medical doctor. I don't know.
10 Q. But you're certainly a consumer.
11 A. Yes.
12 Q. Do you smoke?
13 A. No.
14 Q. Why?
15 A. I choose not to.
16 Q. Do you think it's addictive?
17 A. For me personally?
18 Q. For anybody.
19 A. I don't know. As I say, I'm not a doctor. I
20 don't know.
21 Q. Do you think you have to be a doctor in order to
22 make a determination as to whether something is or is
23 not addictive?
24 A. Yes. Well, not necessarily have to be, but
25 certainly fully understand that.

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1 Q. So I can't be addicted to something until a
2 doctor tells me I am?

3 MR. PURVIS: Object to form.

4 THE WITNESS: No, that's not what I'm
5 saying.

6 BY MR. O'FALLON:

7 Q. Are you familiar with a 1988 Surgeon General's
8 report?

9 A. I don't know it under the date of 1988.

10 Q. Have you read all of the Surgeon General's
11 reports concerning cigarettes?

12 A. No, I haven't.

13 Q. Which ones have you read?

14 A. I don't recall which specific ones I've read.

15 Q. Have you ever read a Surgeon General's report
16 that addressed the issue of addiction?

17 A. I probably -- if I read the report I skipped
18 over parts on addiction.

19 Q. Why?

20 A. Because they weren't germane to what I was
21 looking at.

22 Q. In order to evaluate the impact of cigarette
23 marketing and advertising don't you have to be
24 familiar in general with the public positions the
25 cigarette industry takes concerning the dangers of

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1 its products and the addictions of its products?

2 A. Would you restate it?

3 MR. O'FALLON: We will reread it.

4 (Record read.)

5 THE WITNESS: No.

6 BY MR. O'FALLON:

7 Q. No?

8 A. No.

9 Q. And you don't find that that particular piece of
10 information is at all important in doing the
11 evaluation you've done concerning cigarette
12 advertising, correct?

13 MR. PURVIS: Object to form.

14 THE WITNESS: I don't think it's
15 necessarily relevant to what impact advertising had,
16 no.

17 BY MR. O'FALLON:

18 Q. Wouldn't those public statements concerning the
19 dangers of cigarettes and addiction of cigarettes be
20 part of the marketing mix?

21 MR. PURVIS: Object to the form.

22 THE WITNESS: They could be.

23 BY MR. O'FALLON:

24 Q. Certainly part of the overall message that the
25 consumer would get concerning cigarette as a product,

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1 correct?

2 A. Correct.

3 Q. I'd like to look on page 2 of your report. On
4 page 2 at the bottom of the page you seem to be
5 simply discussing why people choose to engage in
6 specific behaviors or consume certain types of
7 products.

8 Are you specifically talking about here why
9 people choose to consume cigarettes?

10 A. At this point I believe I'm talking about
11 products in general.

12 Q. And included in your definition of products in
13 general would be cigarettes?

14 A. It would be one of many different products that
15 are included under consumer decisions.

16 Q. And I believe you state that among the huge
17 number of factors that must be considered are
18 demographic and social class, lifestyle, cultures,
19 schools, religion, friends, family, prior
20 experiences, media content and marketer controlled
21 stimuli, correct?

22 A. Correct.

23 Q. You define marketer controlled stimuli as
24 advertising, sales promotions, et cetera?

25 A. Correct.

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- 1 Q. Would you agree that marketer controlled stimuli
2 plays some role in the reason that consumers choose
3 certain products?
4 A. It may play a role in why they choose brands.
5 Q. But doesn't play any role in why they would
6 first choose a product?
7 A. It may play a role at some point in time early
8 in the life cycle of a product.
9 Q. You understand by in large initiation occurs
10 before the age of eighteen, correct?
11 A. I've seen studies that show that, yes.
12 Q. You've seen studies that show that by in large
13 people start to smoke, the majority of people start
14 to smoke, before the age of eighteen, correct?
15 A. Correct.
16 Q. Does what you've defined as marketer controlled
17 stimuli play some part in the reason people start to
18 smoke cigarettes?
19 A. I can only go on the basis of the evidence I've
20 seen, and the evidence I've seen shows no compelling
21 research that would indicate that to be the case.
22 Q. You say "no compelling research." You can't
23 state that there is no research that would indicate
24 that advertising or, as you call it, marketer
25 controlled stimuli does not play some part in the

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1 decision to start smoking, correct?
2 A. I would say that there is no credible research
3 that would show that to be the case.
4 Q. Credible as evaluated by you?
5 A. Credible as looking at the specific item that
6 they're testing, looking at alternative hypothesis
7 and be able to stand the test of that kind of an
8 analysis in looking at it.
9 Q. Once again you're not saying there is no
10 evidence that marketer controlled stimuli does not
11 affect cigarette initiation, correct, or smoking
12 initiation?
13 A. There are studies that have made that leap in
14 assumptions, but there have been none that have
15 tested that and shown to be accurate to the best of
16 my knowledge.
17 Q. And of course what you haven't seen is anything
18 within the files of the cigarette industry; is that
19 correct?
20 A. That's correct.
21 Q. Nor did you ask for any such information,
22 correct?
23 A. Correct.
24 Q. Is it your testimony that marketer controlled
25 stimuli plays no part in smoking initiation?

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- 1 A. From the best available evidence, yes.
- 2 Q. Does marketing controlled stimuli play any part
- 3 in whether consumers start to consume any products?
- 4 A. It may.
- 5 Q. What products?
- 6 A. Products during their early introductory stage.
- 7 Q. Do you think that marketer controlled stimuli
- 8 has any effect on whether, for instance, young people
- 9 start to wear perfume?
- 10 A. No, I don't.
- 11 Q. You think one day people just get up and say
- 12 boy, I want to wear perfume?
- 13 A. No.
- 14 Q. The fact that, for instance, a young woman has
- 15 seen cologne ads from the time she was two years old
- 16 until the time she starts to use cologne, which may
- 17 vary, you don't think that plays any part on her
- 18 decision to ultimately decide to use cologne?
- 19 A. That may reflect the rest of the culture, but,
- 20 no. Against the other elements are what's important.
- 21 Q. You can't really separate the rest of the
- 22 culture from advertising since advertising is
- 23 pervasive in this, can you?
- 24 A. Advertising does reflect culture, yes.
- 25 Q. Advertising is pervasive in this culture?

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1 A. Yes.
2 Q. It helps shape this culture?
3 A. No. It reflects.
4 Q. It also shapes. Is it your testimony that there
5 has been no advertising that has ever shaped this
6 culture?
7 MR. PURVIS: Object to form.
8 THE WITNESS: It's going to depend on
9 how we define shape the culture.
10 BY MR. O'FALLON:
11 Q. Define it in any fashion you choose.
12 A. To make changes in what's valuable and what's
13 important in a culture.
14 Q. You think we all drink Coke simply because
15 culture; we're all going to a drink Coke and
16 advertising played no role in that?
17 MR. PURVIS: Object to form.
18 THE WITNESS: No.
19 BY MR. O'FALLON:
20 Q. Advertising certainly plays a role in why we
21 choose to drink Coke, doesn't it?
22 A. That brand choice, yes.
23 Q. It also influences our decision to drink
24 generically Coke, doesn't it?
25 A. No.

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1 Q. Coca-Cola?
 2 A. No.
 3 Q. In fact, the word Coke has become synonymous
 4 with virtually any cola drink, hasn't it?
 5 A. Certain kinds.
 6 Q. Cola drinks.
 7 A. Mm-hmm. Some places, yeah.
 8 Q. It's not unusual for somebody to ask for a Coke
 9 and get a Pepsi, right?
 10 A. That's true.
 11 Q. And not be at all disappointed by that, right?
 12 A. Some are, some aren't.
 13 Q. And you feel that we can simply separate out
 14 advertising from all the other influences in our
 15 life?
 16 It's your testimony that advertising has no
 17 impact upon me as a seven year old choosing to have
 18 my first Coke?
 19 MR. PURVIS: Object to the form.
 20 THE WITNESS: No, that's not true.
 21 BY MR. O'FALLON:
 22 Q. It does have an impact, doesn't it?
 23 A. Correct.
 24 Q. It has a impact on me as a seven year old
 25 choosing to for the first time drink a Coke, right?
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1 A. It's possible.
2 Q. It's probable, isn't it?
3 A. It's possible.
4 Q. It's certainly probable, isn't it?
5 MR. PURVIS: Object to form.
6 THE WITNESS: There is probably other
7 things that are likely to shape your brand
8 preference.
9 BY MR. O'FALLON:
10 Q. But certainly -- let's get off brand preference.
11 When I use Coke, I'm using it generically. Wouldn't
12 you agree that advertising plays a part in my
13 decision for the first time to drink a cola product?
14 A. I have seen no evidence to that.
15 Q. Has it been studied?
16 A. I don't know.
17 Q. Don't you think you would want to know before
18 you sit here and make an opinion?
19 MR. PURVIS: Object to the form.
20 MR. O'FALLON: Excuse me. You think
21 that's funny?
22 MR. WILSON: Yeah, I do. I think
23 you're going from the ridiculous to the sublime.
24 MR. O'FALLON: Thank you, sir.
25 MR. WILSON: You're welcome.
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1 MR. O'FALLON: I'll try to extend the
2 same courtesies in your depositions.

3 MR. PURVIS: I'm --

4 MR. O'FALLON: You chuckled.

5 MR. WILSON: I'm sorry. I did.

6 MR. O'FALLON: I'm glad you find this
7 all humorous. I'm here for your entertainment.

8 Restate the question before the Dorsey
9 attorney decided he had to give us his chuckle.

10 (Record read.)

11 BY MR. O'FALLON:

12 Q. Don't you think you would want to know whether
13 it's been studied before you give an opinion that it
14 has no impact?

15 A. Yes.

16 Q. And it hasn't been studied?

17 A. I don't know.

18 Q. You haven't looked?

19 A. In regard to colas, no.

20 Q. But you feel comfortable even though you don't
21 have any idea whether any research has ever been done
22 on the issue of being able to sit here and opine that
23 cola advertising has no effect on an individual's
24 decision to for the first time try a cola product,
25 correct?

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1 MR. PURVIS: Object to the form.

2 THE WITNESS: Given it's known in
3 consumer behavior, I feel that there is -- there are
4 many other factors that are far more important.

5 BY MR. O'FALLON:

6 Q. I'm not asking you whether it's important or
7 not. I'm asking if it plays any role, any role at
8 all.

9 A. And I haven't seen any evidence for that and I
10 can only tell you what I know from what I've seen.

11 Q. So it would be your opinion that it has no role,
12 correct?

13 A. None that I'm aware of, correct.

14 Q. Is it your testimony that marketer controlled
15 stimuli plays no role in smoking initiation?

16 A. Yes.

17 Q. Would you agree that a person starts to smoke
18 when the real or perceived benefits of smoking
19 outweigh any negative aspects associated with
20 smoking?

21 A. Possibly.

22 Q. More likely than not?

23 A. It's a condition that would be reasonable.

24 Q. Would you agree that some of the real or
25 perceived benefits of smoking include that it's a

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1 symbol of maturity?
2 A. For some people, yeah.
3 Q. That it's a status symbol for some people?
4 A. For some people.
5 Q. That it's a fashion statement for some people?
6 A. It may be.
7 Q. That it's a weight loss aid for some people?
8 A. For some.
9 Q. That it involves a presentation of self in a
10 favorable manner associated with the cigarette brand
11 image?
12 A. Maybe for some.
13 Q. That it represents companionship?
14 A. I don't know that I would say it would represent
15 companionship.
16 Q. How about that it represents a social ice
17 breaker?
18 A. No. I wouldn't say that either.
19 Q. Would you disagree that the cigarette
20 manufacturers are probably aware of the benefits we
21 have just discussed?
22 A. I don't know.
23 Q. Would you expect them to be?
24 A. I would expect them to have an indication of
25 what cigarettes may mean to people.

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- 1 Q. And of course the only way you would know for
2 sure what the cigarette manufacturers thought was to
3 look at their documents, right?
4 A. That would certainly be one way.
5 Q. You would agree that the manufacturers of
6 cigarettes would have tried to communicate these
7 benefits in a way to attract not only switchers but
8 also new smokers, correct?
9 A. Not necessarily.
10 Q. You would agree that the cigarette manufacturers
11 would attempt to communicate these benefits in a way
12 to attract not only switchers but also new smokers,
13 correct?
14 A. Not necessarily.
15 Q. You don't think cigarette manufacturers would
16 want to attract new smokers?
17 A. They may.
18 Q. It would make economic sense, correct?
19 A. It may, sure.
20 Q. The more people who smoke, the more cigarettes
21 the manufacturers sell, right?
22 A. Not necessarily.
23 Q. Really?
24 A. The manufacturers or a manufacturer?
25 Q. The manufacturers.

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- 1 A. The manufacturers?
2 Q. Yes.
3 A. Yes.
4 Q. That would only make sense, right?
5 A. Yeah. I'm sorry. I misunderstood.
6 Q. So at some point the manufacturers have to have
7 an inherent interest in encouraging more people to
8 smoke, correct?
9 A. Not necessarily.
10 Q. Really?
11 A. Mm-hmm.
12 Q. Do you think that most actively attempt to have
13 people not smoke their products or not buy their
14 products?
15 A. No.
16 Q. I mean ultimately the more ultimate consumers of
17 cigarettes, the more money the cigarette industry is
18 going to make, right?
19 A. As an industry, possibly, yes.
20 Q. And certainly whatever share they have among
21 each other of that bigger pie they're going to make
22 more money, right?
23 A. Possibly.
24 Q. That just doesn't make sense. That's not
25 possibly, it's more likely than not, right?

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1 A. There are many factors that go into whether or
2 not that's profitable or more profitable or less
3 profitable.

4 Q. But in general you would agree that the
5 cigarette manufacturers as a whole have an incentive
6 to make the market as large as possible, wouldn't
7 you?

8 A. As a role that may be a positive thing for them,
9 yes.

10 Q. Isn't it more likely than not that that would be
11 their incentive?

12 A. I'm sorry. Their incentive to what?

13 Q. Their economic incentive. Don't the cigarette
14 manufacturers have an economic incentive to make the
15 cigarette market as large as possible?

16 A. Again, as a group that may be beneficial, but it
17 depends on other facts that influence profitability.

18 Q. But in any event, you would agree at least for
19 most products the more of the products you sell, the
20 more ultimately the product will make money; is that
21 correct?

22 A. That's often true.

23 Q. Assuming you're not selling the products at a
24 loss, right?

25 A. That's one of many things that could influence
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1 it, yes.
2 Q. You understand that in the cigarette market the
3 renewal of the market stems almost entirely from new
4 smokers, that is young smokers; is that correct?
5 A. I'm not sure what you mean by renewal of the
6 market.
7 Q. You've never heard of that term?
8 A. I believe I've heard of it.
9 Q. What did it mean to you when you heard it?
10 A. If you mean additional people joining a market
11 to replace those who have left the market? Is that
12 the way you're using it?
13 Q. Yes.
14 A. The question?
15 Q. You understand that the renewal of the market
16 stems entirely from new smokers, that is young
17 smokers, correct?
18 A. Yes.
19 Q. You understand only five percent of smokers
20 start after the age of twenty-four, correct?
21 A. I'm not sure of the exact numbers.
22 Q. Do you understand that the majority of smokers
23 start before the age of eighteen?
24 A. Yes.
25 Q. You understand that cigarettes are a very brand
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1 loyal product, correct?
2 A. Somewhat. Very is a hard thing to say, but
3 certainly brand loyalty is there.
4 Q. Aren't cigarettes considered to be one of the
5 most brand loyal products?
6 A. It is a brand loyal product. I don't know if
7 it's one of the most.
8 Q. If internal company documents said that
9 cigarettes are one of the most brand loyal products
10 you wouldn't fight with that, would you?
11 A. I'm willing to accept it for argument's sake
12 here. I won't fight with it.
13 Q. You would agree that the cigarette manufacturers
14 probably have a good idea of whether or not their
15 product is brand loyal, correct?
16 A. It depends on who said that and what they know.
17 Assuming they're in a position to be aware, that's a
18 reasonable statement.
19 Q. Like, for instance, presuming they were the head
20 of a marketing department?
21 A. It might be.
22 Q. Do you think you would trust the statement by
23 the head of a marketing department of a major
24 manufacturer concerning brand using loyalty of its
25 products for their --

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1 A. Yes.

2 Q. That would be reasonable, wouldn't it?

3 A. Yes.

4 Q. Given the fact that the products are very brand
5 loyal it would make sense for the manufacturers to
6 try to attract as many new smokers as possible at the
7 earliest age possible, correct?

8 A. There is lots of parts to that question so I
9 can't say yes to that without breaking it down.

10 Q. Why?

11 A. Well, you're assuming that the youngest age
12 possible. I don't know that that's true. That --
13 I'm sorry. Could we go through the question again?

14 MR. O'FALLON: Why don't we have it
15 read back.

16 (Record read.)

17 THE WITNESS: I don't know that it
18 would be at the earliest age possible. I don't know
19 that it would be necessarily the most important thing
20 to attract as many new smokers as possible.

21 BY MR. O'FALLON:

22 Q. Assuming a certain level of brand loyalty and a
23 very high level of brand loyalty, you would agree
24 that to attract starters to smoke that that
25 attraction would provide effortless momentum for that

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1 product in the future, and you would agree that given
2 the brand loyalty that is known to exist for
3 cigarettes, that a company that attracts new smokers
4 to its products would have an effortless momentum of
5 sales into the future, correct?
6 A. I would not say that.
7 Q. You would disagree with that?
8 A. Yes.
9 Q. Are you familiar with the term first usual
10 brand?
11 A. Yes.
12 Q. What does it mean to you?
13 A. First brand that one uses in a consistent
14 manner.
15 Q. Would you agree that most smokers choose their
16 first usual brand prior to the age of eighteen?
17 A. Yes.
18 Q. Would you agree that the cigarette manufacturers
19 have an economic incentive to market to these under
20 eighteen smokers, wouldn't you?
21 A. It could.
22 Q. You would agree it would make economic sense for
23 the manufacturers to try to get these new smokers to
24 adopt their brand as the first usual brand of that
25 smoker, correct?

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1 A. It could.
 2 Q. Is it your understanding that every major
 3 cigarette brand has been compelled by first usual
 4 brand use?
 5 A. I'm not sure I understand the question.
 6 Q. Is it your understanding that every major brand
 7 of cigarettes in the last forty years has been
 8 compelled by having that brand adopted as a first
 9 usual brand by smokers?
 10 A. I'm sorry. I'm really having a hard time
 11 understanding that question. Compelled by --
 12 Q. Would you agree that every major brand in the
 13 last forty years has been compelled by first usual
 14 brand adoption?
 15 MR. PURVIS: Object to the form.
 16 THE WITNESS: I'm having a hard time
 17 understanding what compelled by means in the
 18 question.
 19 BY MR. O'FALLON:
 20 Q. Would it be your understanding that every major
 21 brand in the last forty years has been a brand that's
 22 been predominantly adopted as a first usual brand by
 23 under age smokers?
 24 A. I would assume by some of them.
 25 Q. All of them; all the major brands?
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- 1 A. Some users.
2 Q. Obviously some users?
3 A. That's why I'm having a hard time understanding
4 the question.
5 Q. You understand the notion of brand loyalty?
6 A. Correct.
7 Q. You understand the notion of first usual brand?
8 A. Correct.
9 Q. You understand that most smokers adopt a first
10 usual brand before the age of eighteen?
11 A. Okay.
12 Q. You understand that cigarettes that are
13 successful in having their brands chosen as the first
14 usual brand are by in large the most successful
15 brands thereafter, correct?
16 A. I don't know historically, but certainly many of
17 them have been very successful. I don't know
18 completely.
19 Q. It would make economic sense for the cigarette
20 manufacturers to pursue the starter market, correct?
21 A. It might.
22 Q. It would make economic sense for the
23 manufacturers to try to persuade as many people as
24 possible to start smoking, correct?
25 A. It might.

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- 1 Q. Would it or wouldn't it?
2 A. It's a factor that could be important in overall
3 market.
4 Q. Isn't it more likely than not that it would make
5 economic sense for the manufacturers to encourage as
6 many people as possible to smoke cigarettes?
7 A. All manufacturers to increase the entire market,
8 that might indeed be true.
9 Q. Is it true?
10 A. Yes.
11 Q. But it's your testimony that even though they
12 have -- well, is it your understanding that the
13 manufacturers design any of their advertising to
14 encourage as many people as possible to smoke?
15 A. No. My understanding is that what they -- what
16 they are likely to do is to encourage brand choice.
17 Q. Before you make a brand choice you have to make
18 a decision to start smoking, correct?
19 A. Yes, usually.
20 Q. And so the first thing they have to encourage is
21 is there somebody to start smoking, correct?
22 A. Not necessarily.
23 Q. But they do, don't they?
24 A. I've seen no evidence to that. I don't know.
25 Q. Has that been studied?

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- 1 A. In terms of looking at reasons why people start
2 smoking.
3 Q. How about in terms of looking at whether the
4 manufacturers' advertising geared toward encouraging
5 people to start smoking? Has anybody ever looked at
6 that?
7 A. I'm sure people have tried to do that, yes.
8 Q. Are you aware of those studies?
9 A. Some.
10 Q. And do some of them conclude that, in fact,
11 advertising does play a part in people choosing to
12 smoke?
13 A. Some of them do make that conclusion.
14 Q. You simply disagree with those conclusions?
15 A. Yes.
16 Q. And you disagree with those studies?
17 A. Yes.
18 Q. But that doesn't mean they don't exist, right?
19 A. Yes.
20 Q. Studies do exist that show that people -- in
21 fact, one of the substantial factors in starting to
22 smoke is advertising, correct?
23 A. Yes. I'm sorry. Could you repeat that so I
24 understand?
25 (Record read.)

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1 THE WITNESS: No, that's not correct.
2 BY MR. O'FALLON:
3 Q. Studies show that one of the substantial factors
4 in starting to smoke is advertising, correct?
5 A. No.
6 Q. No study shows that?
7 MR. PURVIS: Object to the form.
8 THE WITNESS: No study shows that as
9 I heard the question. Could I hear it again?
10 (Record read.)
11 THE WITNESS: No. Studies do not show
12 that.
13 BY MR. O'FALLON:
14 Q. Is it your testimony that marketer controlled
15 stimuli influences the decision to start smoking?
16 A. No study directly shows that.
17 Q. Do studies indirectly show that?
18 A. Studies claim that.
19 Q. Studies have claimed to show that, correct?
20 A. Correct.
21 Q. Studies have also claimed to show that what you
22 define as marketer controlled stimuli plays a
23 substantial factor in the decision of a person to
24 start smoking, correct?
25 A. Could I have that again?
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- 1 Q. I'll restate it. Studies have shown that what
2 you define as marketer controlled stimuli is a
3 substantial factor in an individual's decision to
4 start smoking, correct?
5 A. No.
6 Q. No study?
7 A. None that I'm aware of.
8 Q. Would you concede that marketer controlled
9 stimuli is a factor in an individual's decision to
10 start smoking?
11 A. I have not seen any evidence that I find
12 credible to show that that's the case, so the answer
13 is no.
14 Q. On page 3 you state that marketer controlled
15 stimuli is a weak force, correct?
16 A. Correct.
17 Q. How do you judge that?
18 A. Looking at relative -- well, there are several
19 different ways to judge something like that.
20 Q. What are those ways?
21 A. One could look at people's reports of what
22 factors influence them, one can measure various
23 factors and look at their relative contribution.
24 Q. Would recall be one of the things that would
25 enter into that evaluation?

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1 A. In regard to -- what was that?
2 MR. O'FALLON: Read it please.
3 (Record read.)
4 BY MR. O'FALLON:
5 Q. Of whether or not advertising is a weak force or
6 a strong force.
7 A. In regard to choice? I'm sorry.
8 MR. O'FALLON: Read it again please.
9 (Record read.)
10 THE WITNESS: It may be one of the
11 things.
12 BY MR. O'FALLON:
13 Q. That's what you're talking about on page 3,
14 correct?
15 MR. PURVIS: Object to the form.
16 BY MR. O'FALLON:
17 Q. You state that, however, we screen out and
18 ignore the vast majority of these ads, correct?
19 A. Correct.
20 Q. A study estimated that the average consumer only
21 notices about seventy-six of these ads each day and
22 forms a mental reaction to only about twelve of them.
23 Do you see that?
24 A. Yes.
25 Q. So seventy-six, and forms a mental reaction to
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- 1 only about twelve of them, correct?
- 2 A. Correct.
- 3 Q. And then you talk about whether ads are
- 4 forgotten, correct?
- 5 A. Correct.
- 6 Q. So one way to evaluate on whether an ad is
- 7 effective in effecting choice is to determine the
- 8 recall of that ad, right?
- 9 A. It's a necessary, but not sufficient condition.
- 10 Q. But it's one factor that you're looking at in
- 11 your expert opinion here, correct?
- 12 A. It's one factor.
- 13 Q. So the fact that the vast majority of people
- 14 can, for instance, identify a trade character would
- 15 indicate that that particular advertising is having
- 16 an impact, right?
- 17 A. If we talk about impact being recognition or
- 18 recall, yes.
- 19 Q. Well, is it?
- 20 A. Impact has many meanings, one of which is
- 21 recognition and recall into that degree, yes.
- 22 Recognition, typically I believe you're talking about
- 23 hear rather than recall.
- 24 Q. It might be both, right?
- 25 A. It's possible it could be both.

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1 Q. So recognition and recall is one way in which to
2 judge the effectiveness of marketer controlled
3 stimuli, correct?

4 A. It's one of the proven factors one would look
5 at.

6 Q. What are the other factors?

7 A. Well, you would want to look at attitudes, you
8 would want to look at preferences, you would want to
9 look at behavior, you would want to look at
10 knowledge.

11 Q. Anything else?

12 A. Beliefs.

13 Q. You understand that most cigarette advertising
14 campaigns have fairly high recall among the
15 population, right?

16 MR. PURVIS: Object to the form.

17 THE WITNESS: I'm not sure that I know
18 most do.

19 BY MR. O'FALLON:

20 Q. Well, I believe your own study, your own opinion
21 here, includes statistics that say some fifty-one
22 percent of three to six year olds recognize Joe Camel
23 as a trade character, right?

24 A. Yes.

25 Q. That should be the last group of people that
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1 should recognize Joe Camel, right?
2 MR. PURVIS: Object to the form.
3 THE WITNESS: It's hard to say.
4 BY MR. O'FALLON:
5 Q. What do you mean? Didn't you testify earlier
6 today that three to six year olds are much less
7 likely to recall than older kids?
8 A. Yes.
9 Q. Zero to two year olds I think we can both
10 concede probably aren't going to recall that, right?
11 A. Right.
12 Q. So the fact that fifty-one percent of the group
13 that should be the least likely to recall the Joe
14 Camel campaign would indicate that that campaign has
15 been relatively successful, wouldn't it?
16 MR. PURVIS: Object to the form.
17 THE WITNESS: Only in terms of
18 achieving recall.
19 BY MR. O'FALLON:
20 Q. And recognition?
21 A. Excuse me. Not recognition, recall.
22 Q. Both?
23 A. Well, I believe --
24 Q. Certainly it's going to be hard to recognize
25 something if you can't recall, isn't it?
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1 A. No, it's the other way around.
2 Q. What's the difference between recall and
3 recognition?
4 A. Recognition is usually aided, recall isn't.
5 Q. Do you know how many of those kids recall Joe
6 Camel?
7 A. I don't recall that question being asked.
8 Q. Marlboro is pretty recognizable as a trade name,
9 correct?
10 A. Yes.
11 Q. Even to small children, right?
12 A. Yes.
13 Q. I mean that's in the literature, right?
14 A. Yes.
15 Q. So it appears that that advertising message is
16 getting through, right?
17 MR. PURVIS: Object to the form. Dan,
18 it's after five now.
19 MR. O'FALLON: Let me get an answer to
20 the last question.
21 THE WITNESS: Could we have the
22 question read?
23 (Record read.)
24 BY MR. O'FALLON:
25 Q. So the Marlboro and Camel message are getting
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1 through even to the youngest ages of the population,
2 correct?

3 MR. PURVIS: Object to the form.

4 THE WITNESS: Some are capable of
5 recognizing those images.

6 BY MR. O'FALLON:

7 Q. The majority, right?

8 A. Of what ages?

9 Q. The majority of the youngest ages, three to six?

10 A. As a whole I believe that's correct. I would
11 need to look to be absolutely certain.

12 Q. It would stand to reason that the older groups
13 would have an even greater recall, wouldn't it?

14 A. Correct.

15 MR. O'FALLON: Why don't we break for
16 today.

17 (Time 5:03 p.m.)

18

19

20

21

22

23

24

25

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C E R T I F I C A T E

I, NANCY K. JOHNS, hereby certify that I am qualified as a verbatim shorthand reporter; that I took in stenographic shorthand the testimony of RONALD J. FABER, Ph.D. at the time and place aforesaid; and that the foregoing transcript consisting of pages 1 through is a true and correct, full and complete transcription of said shorthand notes, to the best of my ability.

Dated at Minneapolis, Minnesota, this 18th day of September, 1997.

Nancy K. Johns, Notary Public
Hennepin County, Minnesota
My commission expires January 31, 2000.

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1 C E R T I F I C A T I O N
2 I, RONALD J. FABER, Ph.D, the deponent,
3 hereby certify that I have read the foregoing
4 transcript consisting of pages 1 through , and that
5 said transcript is a true and correct, full and
6 complete transcription of my deposition except:
7
8
9
10
11
12
13
14
15

16 RONALD J. FABER, Ph.D.
17 Deponent
18

19 Sworn and subscribed to before me this
20 day of , 1997.
21
22
23

24 Notary Public
25 My commission expires

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